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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1942

No. 584

HONORABLE MICHAEL J. ROCHE, United States District Judge for the Northern District of California, Southern Division, et al.,

vs.

EVAPORATED MILK ASSOCIATION, et al.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENTS.

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BRIEF FOR RESPONDENTS.

OPINION BELOW.

The opinion of the Circuit Court of Appeals (R. 130) is reported in 130 F. (2d) 843.

JURISDICTION.

The judgment of the Circuit Court of Appeals on rehearing was entered September 12, 1942 (R. 129, 148).

Petition for certiorari was filed December 12, 1942, and was granted February 8, 1943 (R. 152). The jurisdiction of this Court is invoked under section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED.

Section 262 of the Judicial Code (28 U. S. C. 377) provides in part:

> "The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

Section 284 of the Judicial Code (28 U. S. C. 421) provides in part:

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months; *Provided*, That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place."

Section 566 of the Revised Statutes (28 U. S. C. 770) provides in part:

> "The trial of issues of fact in the district courts, in all causes except cases in equity and cases of admir-

alty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury."

Section 1011 of the Revised Statutes (28 U. S. C. 879) provides:

"There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The Act of May 9, 1942 (18 U. S. C. 682) provides in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances, to wit:

From a decision or judgment quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section."

STATEMENT OF THE CASE

The statement of the case in the Government's brief omits most of the pertinent facts as to the pleas based upon section 284 of the Judicial Code, and all of the facts as to the pleas based upon the court's order under that statute. These omitted facts are in our opinion determinative of the case. Accordingly we desire to restate the case.

A. Preliminary statement.

Respondents are twenty-two corporations, one association, and twenty individuals engaged in the manufacture and sale of evaporated milk or activities alleged to be connected therewith (R. 13-16). They are under indictment (R. 12), returned June 3, 1941 (R. 21), for alleged violations of the Sherman Act.

All respondents filed pleas raising the point that the grand jury had no jurisdiction to return the indictment and that the court has no jurisdiction to try the case (R. 34, 43). While there are several pleas they set up in essence (1) that the investigation culminating in the indictment was not begun during the November 1940 Term, and (2) that no investigation was begun on or before February 26, 1941. If these facts are true the grand jury—(1) by express statutory provision, and (2) by reason of the terms of the court's order continuing its existence under that statute from the November 1940 Term to the March 1941 Term, at which the indictment was returned—had no jurisdiction to return the indictment and the court, therefore, has no jurisdiction to try the case (infra, this brief).

The Government filed replications traversing these pleas (R. 8, 51-52). The court set them down for trial before a jury (R. 9, 49-50). Nearly three months later and on the eve of trial the Government moved for leave to withdraw its replications and to strike the pleas (R. 9, 52-53). The trial court granted the Government's motions (R. 69-70). Respondents moved the court to vacate its order striking the pleas, to reinstate the pleas and replications, and to

reset the pleas for jury trial (R. 9, 70). This motion was denied (R. 9, 70).

Thereupon respondents applied to the Circuit Court of Appeals for a writ of mandamus or other appropriate writ (R. 1, 2). After hearing on return to an order to show cause (R. 55), the court issued the writ as prayed, all judges concurring (R. 124). After rehearing before the seven circuit judges sitting in bank (R. 128) the court again ordered the writ to issue (R. 129, 148; opinion, R. 130). Two judges dissented (Denman and Healy, JJ., R. 130); one did not participate (Stephens, J., R. 129).

B. The facts.

On June 3, 1941, there was returned and filed in the District Court an "indictment" (R. 3, 12) purporting to charge respondents with violations of sections 1 and 3 of the Sherman Antitrust Act (15 U.S.C. 1, 3). The grand jury which returned this indictment was impaneled at the November 1940 Term (R. 3). This term expired at midnight, March 2, 1941 (R. 4). The indictment was returned at the end of the succeeding March 1941 Term (R. 3, 21). The grand jury, therefore, had no jurisdiction to return the indictment in the March 1941 Term, except as authorized by section 284 of the Judicial Code (28 U.S.C. 421), which provides:

> "A district judge may, upon request of the district attorney or of the grand jury or on his own motion, **by order** authorize any grand jury to continue to sit during the term succeeding the term at which such request was made, **solely to finish investigations begun but not finished by such grand jury,** * * *."

Purporting to act under this statute, counsel for the United States executed on February 25, 1941, and filed with the District Court on February 26, 1941 (R. 22-23) a petition which alleged that certain investigations had then been begun but not finished, and which prayed, on that ground, for an order of the court continuing the grand jury in session during the March 1941 Term "solely to finish said investigations." This petition (R. 4, 47) is set out in the footnote.[1]

On February 28, 1941, the court issued its order granting this petition and authorizing the November 1940 Term Grand Jury to continue to sit during the March 1941 Term for the sole purpose of finishing said investigations re-

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[1] "PETITION

Now come Frank J. Hennessy, United States Attorney for the Northern District of California, Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, and represent that certain investigations have been begun by the November 1940 Term Grand Jury for the Northern District of California, Southern Division, which have not been finished and can not be finished within said term.

It is therefore respectfully requested that an order be entered by this Court authorizing the said November 1940 Term Grand Jury to continue to sit during the term succeeding the said November 1940 Term, to-wit: the March 1941 Term, solely to finish said investigations begun but not finished by the said November 1940 Term Grand Jury.

Frank J. Hennessy
United States Attorney.
for the Northern District of California
Tom C. Clark
Charles C. Pearce
Special Assistants to the Attorney General.

Dated at San Francisco, California, This 25 day of February, 1941."

ferred to in the petition. This order (R. 4, 48) is set out in the footnote.[2]

On July 2, 1941, shortly after the return of the indictment, respondents filed a motion for an order requiring the Government (1) to disclose the day on which the grand jury commenced its investigation of the matters which culminated in this indictment, and (2) to disclose the attendance record of the grand jury (R. 5, 84-85). This motion was granted (R. 86).

On August 6, 1941, in compliance with the part of this order directing disclosure of the commencement date of the investigation, it was stated in open court that the investigation was begun "shortly after November 6th—in any event during the November term" (R. 5, 30-31).

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[2] "IN RE: NOVEMBER TERM, A. D. 1940 GRAND JURY
ORDER

This matter coming on to be heard upon the petition of Frank J. Hennessy, United States Attorney for the Northern District of California; Tom C. Clark and Charles C. Pearce, Special Assistants to the Attorney General, for an order authorizing the November 1940 Term Grand Jury for the Northern District of California, Southern Division, to continue to sit during the March 1941 Term for the sole purpose of finishing certain investigations undertaken during the November 1940 Term which have not been and cannot be finished by said Grand Jury within said November 1940 Term, and it appearing to the Court that said investigations begun by said Grand Jury within said November 1940 Term have not and cannot be finished within said Term;

IT IS THEREFORE ORDERED that the November 1940 Term Grand Jury now sitting in this Division and District, be and it is hereby authorized to continue to sit during the March 1941 Term of this Court for the sole purpose of finishing said investigations begun but not finished by it during the November 1940 Term of this Court.

A. F. St. Sure
United States District Judge

Dated at San Francisco, California, this 28th day of February 1941."

The date of the commencement of the investigation had a double significance:

(1) Unless the investigation was begun during the November 1940 Term, the grand jury had no jurisdiction, under the statute, to return this indictment in the succeeding term; and unless it was begun prior to February 26th, the grand jury had no jurisdiction under the court's order.

(2) The personnel of the grand jury was changed by adding five new members at the start of the new term (R. 27-28). If, as believed by defense counsel from the statements of government counsel (R. 5, 30-31), the investigation started in the November 1940 Term and was continued in the March 1941 Term, then the personnel of this judicial body (the grand jury) had been changed in the middle of the case. In this latter connection it also appeared from the disclosure of the grand jury attendance record (following R. 54), that **only five** members of the grand jury were present at all sessions during the two terms; that there were less than twelve of the grand jurors (i. e. less than the statutory number to indict) who were not absent from substantial numbers of sessions, such absences running in some cases to more than forty per cent of the sessions.

On the above facts, defense counsel moved to quash the indictment on the grounds (1) that the personnel of a grand jury, a judicial body, cannot be changed in the middle of a proceeding, and (2) that a grand juror with substantial absences from sessions is disqualified to vote,

and that here there were less than the statutory number required to indict who were not so disqualified (R. 87).[3]

In opposition to this motion, and to destroy the significance of the absences of grand jurors during the November Term and the substitution of the new jurors at the beginning of the March Term, the government attorneys in a brief filed on August 20, 1941, **for the first time** stated that the grand jury during the November 1940 Term considered only "routine matters," and

> "the matters relating to the indictment now under attack were not considered until February 28, 1941" (R. 6).

February 28, 1941, was three days after the Government's petition to continue the grand jury was executed and two days after it was filed, and hence three days, or at the

[3]Respondents relied in part on these motions on the position taken by the Antitrust Division itself with regard to absences of grand jurors. Quoting from *The Sherman Antitrust Act and Its Enforcement*, by Assistant Attorney General Arnold and Staff Members of the Antitrust Division, U. S. Department of Justice (Vol. VII, p. 120, *Law and Contemporary Problems*, Duke University, 1940):

> "The number of the grand jurors is twenty-three, a quorum is sixteen, and the vote of twelve qualified jurors is necessary in order to return a true bill. If sixteen jurors are present they are sufficient to continue with the proceeding. Of course, it is much more advisable to have all jurors present, and as a practical matter counsel and the foreman should join in trying to enforce a rule that limits very materially the right of jurors to be absent. This is important to avoid such a situation as an indictment for which only twelve qualified jurors voted, one of whom has been absent from the grand jury room for an appreciable amount of time. **If those facts were ever to come to light,** the contention could be made with plausibility that the juror who was absent most of the time really did not exercise his own discretion on the evidence in casting his vote. Hence, the wisest course is to have just as many of the twenty-three jurors present as possible."

latest two days, after the date for beginning investigations under the order of the court continuing the grand jury in session. It was also **the last day** on which the grand jury sat at the November 1940 Term (R. 6).

On August 22, 1941, government counsel made further disclosures in order to defeat respondents' pending motions.[4] The record is as follows:

> "Mr. Burdell. In this case, your Honor, might I say one or two words before the actual argument on the motions commences? At the time that the Government was required to comply with the motion for disclosure, one of the demands that the Government was compelled to comply with was a demand for the date of the commencement of the investigation which resulted in the return of the indictment. The Government was required to make that disclosure in open court without access to records, and the best it was able to do was to state that the investigation began during the November, 1940 term. At that time it was thought that the disclosure was sufficient and satisfactory. However, as a result of subsequent motions that have been filed it appears that the actual date of the commencement of the investigation is very material. I would like, therefore, permission to comply more completely with the demand in the motion for disclosure, **and now state for the record the exact date of the commencement of the investigation.**
>
> . . . . . .
>
> The Court. Were you the one that presented it?
> Mr. Burdell. Yes.
> The Court. Was there anyone presented any testimony to the grand jury in this case before you did, do you know?

[4] These motions were denied after the hearing.

Mr. Burdell. I was present at every grand jury session, your Honor, when matters relating to this indictment were presented.

The Court. What was the first date that any testimony was taken before the grand jury, if you know?

Mr. Burdell. February 28, 1941" (R. 31, 33).

This categorical statement, if correct, lessened the significance of the change in the grand jury personnel and of the absences of the grand jurors, because February 28 was the last session of the March 1941 Term (R. 4, 26). However, if February 28 was "the exact date of the commencement of the investigation" (Burdell, supra), it was immediately apparent that the grand jury had no jurisdiction to return the indictment because an investigation commenced on that date was **outside the scope of the court's order continuing the life of the grand jury into the next term** (see order quoted supra, p. 7). And the further question was immediately suggested—since the single morning session of February 28th was the last session of the November Term—whether at any time during the November Term an investigation of this particular case was actually begun, so as to authorize the grand jury—continued "solely to finish investigations begun"—to return the indictment in this case.

Following the statements above quoted, at which February 28th was formally given as the commencement date, the court took a recess (R. 33). When court reconvened another date was stated, namely, February 27th (R. 33). In support of this third date government counsel **read** into the record (defense counsel were never permitted to **see** the minutes of the grand jury) the following, which were

said to be the minutes of the grand jury dated February 28, 1941:

"Mr. Burdell. I will now read in the minutes of the grand jury dated February 28, 1941:

'Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Sloss, presiding. Minutes of previous meeting read and approved as corrected. (see below) Special Assistant to the Attorney General Charles C. Pearce and Special Assistant Charles S. Burdell continued the presentation of the investigation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned.' Signed, I think it is, 'C. N. Alexander, Secretary,' and 'Approved Eva L. Gibson, Foreman, pro tem.'

Then below the following appears:

'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigatron of Sugar Beet Industry was begun. Other industries named as subject to investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Charries.'" (R. 33-34.)

The text of the minutes of February 27th was not disclosed (R. 34), nor was any further light shed upon the happenings of that day, although the attorney for the

Government who had previously said that he was present at every session of the grand jury touching this case was in court with the minutes in his hand.

On the basis of either date stated by government counsel as the date of commencement of the investigation (February 27th or 28th), it appeared that the indictment was outside the scope of the court's order continuing the grand jury in session.

But in addition, when the minutes of the grand jury were read to support counsel's last statement of February 27th as the date of beginning, it appeared for the first time that the investigation of the particular matters and defendants involved **in this indictment** was not begun at all during the November 1940 Term. The minutes simply state that **sixteen** nationwide industries, comprising in the aggregate virtually the entire food industry of the country, were "named" by witnesses. As to a whole group of these (eight in all) they state generally "and investigation begun." But with respect to **this particular indictment** counsel already had categorically stated that no testimony was taken prior to February 28th.

> "The Court. What was the first date that any testimony was taken before the grand jury, if you know?
>
> Mr. Burdell. February 28, 1941" (R. 33).

This is contrary to the minutes of the 28th which show that no testimony was taken or investigation made on that day of any matters alleged in this indictment. Government counsel stated that the passage above quoted was the whole record of that day (R. 34). On the preced-

ing day, February 27th, the grand jury was investigating the "peach industry," for the minutes of the 28th recite that on that day government counsel "**continued** the presentation of the investigation of the peach industry." On the same day, it is said, sixteen nationwide industries were "named" by witnesses. No defendant in this indictment, no offense charged in this indictment, is "named." The entry contains the words "and investigation begun," with nothing to answe. the many questions which at once suggest themselves. Investigation of what? Of all the industries? Or only some? Of all the persons and companies in each industry? If not, which? Did the grand jury complete investigation of three national industries in one day and begin on the milk industry the same day?

The minutes of February 28th and the correction of those of the 27th also reveal that they were written at some later time. They are "Approved Eva L. Gibson, Foreman, pro tem" (R. 7). Mrs. Sloss was the Foreman of this grand jury and was present at the February 27th, February 28th, March 4th and March 5th sessions of the grand jury (R. 7, 28). Mrs. Gibson was not appointed Foreman pro tem until March 5, which was in the new term (R. 28-29).

Promptly after the above disclosures, respondents filed the pleas under consideration, challenging the jurisdiction of the grand jury to return the indictment and the jurisdiction of the court to try respondents thereon.

One set of pleas was filed by the Carnation Company, and a similar set of pleas was filed on behalf of all other

respondents (R. 34, 43).[5] Each set of pleas raised the points (1) that no investigation was begun at the November Term, this being directed to the statutory requirement already referred to, and (2) that no investigation was begun on or before February 26, 1941, this being directed to the scope of the court's order.

On September 22, 1941, the Government filed replications to these pleas (R. 8, 51-52). These replications were general denials, joining issues of fact. Thereupon respondents demanded a jury trial. The right to such a trial was conceded by the Government (R. 9) and the court set the pleas down for trial by jury on December 3, 1941 (R. 9).

Shortly prior to December 3, the jury trial of the pleas was continued at the Government's request to December 15, 1941 (R. 9). On December 9, 1941, the Government, without showing any cause why it should be permitted to change its pleadings, filed a motion for leave to withdraw its replications and to strike the pleas (R. 9, 52-55).

On January 28, 1942, the District Court granted these motions and struck the pleas (R. 9). Respondents thereupon moved the court to vacate its order striking the pleas, to reinstate the pleas and replications, and to reset the pleas for jury trial (R. 9). This motion was denied (R. 9).

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[5]The first three pleas of the Carnation Company (R. 34-39) were demurred to in the court below, and the demurrers sustained. They are not involved in this proceeding. The fourth and fifth (R. 39-41) are the pleas raising the issues here involved and which were stricken by the District Court.

The petition for a writ of mandamus followed, and was granted by the Circuit Court of Appeals as already discussed (supra, p. 5).

SUMMARY OF ARGUMENT.

The Circuit Court of Appeals had power to issue the writ of mandamus under section 262 of the Judicial Code. This power is not affected by section 1011 of the Revised Statutes. The only question is whether, under the special circumstances of this case, the court should have exercised its power to issue the writ. Among the "special circumstances" which have been held sufficient to require the issuance of a writ of mandamus, are the following:

That the action of the trial court has denied petitioners the right to trial by jury;

That the questions presented involve matters of public importance in the administration of justice;

That the matters presented involve the jurisdiction of the trial court;

That no appeal lies from the challenged order and if the parties are remitted to relief on appeal from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake. This circumstance has particular force at this time because of the important war work being performed by respondents.

All of these circumstances are present in this case and warranted the issuance of the writ.

The writ of mandate was not improper on the ground that the District Court ruled correctly in striking out the pleas. The two points made by the Government in this regard are unsound. The pleas state facts showing that the investigation of the matters in this indictment was not begun at the November 1940 Term, and therefore that the indictment returned at the succeeding March Term was in violation of the statute (Judicial Code, sec. 284, 28 U.S.C. 421, supra). The pleas show that this case was outside the scope of the order of the District Court continuing the life of the grand jury into the March Term. The facts so stated constitute a defense.

ARGUMENT.

I.

THE CIRCUIT COURT OF APPEALS HAD JURISDICTION TO ISSUE MANDAMUS.

A. The Circuit Court of Appeals had "jurisdiction," in the sense that it had the power, to issue mandamus and correctly did so if the exceptional circumstances of this case warranted the exercise of its discretion in that regard.

The Government contends that the circuit courts of appeals have no power to issue a writ of mandamus (1) if the writ is used to correct an erroneous ruling of the trial court in a case over which it has jurisdiction, (2) if there is an ultimate remedy by appeal, or (3) if the writ is not issued in aid of an appeal already pending (Brief for Petitioners, p. 10).

These contentions long since have been foreclosed by the decisions of this Court.

Section 262 of the Judicial Code provides:

> "The supreme court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

In *Ex Parte United States* (1932) 287 U.S. 241, this Court, construing this statute and stating the rule as to jurisdiction, held that while the granting of mandamus in any case rests in the discretion of the court, the ultimate plenary power to issue the writ exists where the case in which it operates is one within the appellate jurisdiction of the court—"the issue of the writ may rest upon the ultimate power which we have to review the case itself" (287 U.S., 246). In so ruling the Court stated and applied principles long established by this Court.

In *Ex parte Simons* (1918) 247 U.S. 231, the trial court had erroneously transferred a cause to the equity side of the docket. Plaintiff applied to this Court for a writ of mandamus to compel the trial judge to vacate his order and to grant a jury trial. In opposing this petition respondent presented the identical argument here advanced by petitioners (247 U.S., 236):

> "So far as petitioner's right at law is concerned, her constitutional right to trial by jury is no more and no less involved than is the right of any other plaintiff to whose declaration at law a general demurrer has been sustained. If the demurrer was improperly sustained, the petitioner will, after reversal and remandment, obtain her jury trial."

This Court, however, rejected this contention and directed the issuance of the writ, saying (247 U.S., 239):

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

In *Ex parte Peterson* (1920) 253 U.S. 300, the trial court appointed an auditor in an action at law. Application for a writ of mandamus was made to this Court, petitioner contending that the order appointing the auditor would result in a violation of his constitutional right to a jury trial. Overruling objections to its jurisdiction to issue the writ, this Court said (253 U.S., 305-306):

> "Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons*, 247 U.S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection

to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition."

In *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86, this court, in issuing a writ of mandamus to the Court of Claims to compel that court to afford plaintiff the right to dismiss the suit, said (265 U.S., 95-96):

> "It only remains to inquire whether this is a proper case for the writ asked. Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion. Although classed as a legal remedy, in issuing it a court must be largely controlled by equitable principles. *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 312; *Arant v. Lane*, 249 U.S. 367, 371. It would be a useless waste of time and effort to enforce a trial in the Court of Claims if we were, upon appeal, to find that the petitioner was unjustly deprived of his substantial right to dismiss his petition, as we should have to do for the reasons stated. Added to this is the consideration which has been regarded as furnishing a substantial ground for the extraordinary process of the writ that the petitioner by a denial of his right to dismiss in the Court of Claims will be deprived of a right of trial by jury in the state court of Washington. *Ex parte Peterson*, 253 U.S. 300, 305; *Ex parte Simons*, 247 U.S. 231, 239."

In *McClellan v. Carland* (1910) 217 U.S. 268, the trial court had erroneously granted a continuance of the trial until after the determination of proceedings in a state court. This Court held that the Circuit Court of Appeals should have issued mandamus to set aside this ruling and to direct the trial to proceed. Answering objections to

the jurisdiction of the Circuit Court of Appeals, this Court said (p. 280):

> "There are not wanting decisions in the Federal courts holding different views as to the right to issue such writs as are involved in this case, before the appellate court has actually obtained jurisdiction of the case. There are expressions in opinions of this court to the effect that such writs issue in aid of a jurisdiction actually acquired. But we think it the true rule that where a case is within the appellate jurisdiction of the higher court a writ of mandamus may issue in aid of the appellate jurisdiction which might otherwise be defeated by the unauthorized action of the court below."

And in *Los Angeles Brush Corp. v. James* (1927) 272 U.S. 701, where this Court directed its writ to the district court to correct an erroneous order referring a patent case to a master for trial, the Court said (pp. 705-706):

> "The hearing of these causes in review would normally be had in the Circuit Court of Appeals of the Ninth Circuit, and they could only come here in due course by applications for certiorari and the granting of them. We do not need to decide whether the intervention between this Court and the District Court of an intermediate appellate court would prevent the issue of mandamus by this Court, direct to the District Court, in matters in which the Circuit Court of Appeals would or should ordinarily have power to issue a mandamus to the same end in aid of its appellate jurisdiction. * * * The question of thus using the writ of mandamus would be a matter of discretion in this Court, and it would decline to exercise its power where the issue might more properly come up by mandamus in an intermediate appellate court or in regular proceedings on review."

An identical decision is *McCullough v. Cosgrave* (1940) 309 U.S. 634.

See also,

D. L. & W. R. R. v. Rellstab (1928) 276 U.S. 1, 5.

In each of these cases, and in many others that might be cited, no appeal was pending at the time the writ issued; the erroneous order complained of and corrected by mandamus was one made by the court acting within its jurisdiction; and the order could ultimately have been reviewed on appeal. Nevertheless in each case this Court affirmed its power or that of the Circuit Court of Appeals to issue the writ, pointing out that in all such cases the question whether the writ should issue is one resting within the discretion of the court.

The Government suggests a distinction of the above cases on the ground that there may be a difference in the power of this Court and that of the Circuit Court of Appeals (Brief for Petitioners, p. 27, et seq.; and see pp. 34-35). No such distinction is permissible under section 262 of the Judicial Code which applies alike to both courts. Beyond this, such a distinction is directly contrary to the principle established in *Los Angeles Brush Corp. v. James* (1927) 272 U.S. 701, and *Ex parte United States* (1932) 287 U.S. 241; that an application for mandamus ordinarily should be made to the Circuit Court of Appeals, rather than to this Court—a principle many times applied. See,

Ex parte Apex Electric Manufacturing Co. (1927) 274 U.S. 725;

Ex parte Daugherty (1931) 282 U.S. 809;

Ex parte Krentler-Arnold Hinge Last Co. (1932) 286 U.S. 533;

Ex parte Western Loan & Securities Co. (1933) 290 U.S. 601;

Ex parte Miller (1934) 290 U.S. 605;

Ex parte Grubbs (1934) 293 U.S. 521;

Ex parte Northern Insurance Co. of New York (1935) 296 U.S. 547;

Ex parte Steelman (1937) 301 U.S. 665.

The ruling of the court below is also in accord with many decisions of the circuit courts of appeals. In *Whittel v. Roche* (9th C.C.A., 1937) 88 F. (2d) 366, 371, the court after a review of the cases pointed out that under the rule now established

> "* * * the writ is not necessarily confined to controlling the action of the lower court so that the question involved shall ultimately reach the Circuit Court of Appeals on appeal, and then be determined, but may be issued where the purpose of the writ is to give effective control over matters pending in the District Court where the right of appeal may be entirely ineffective to correct the erroneous ruling of the trial court.

> * * * * * * *

> The question [in each case] is whether or not there are such special circumstances as would authorize or require this court to exercise by mandamus its supervisory power over the trial court."[6]

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[6]In the court below the Government conceded that under the doctrine of this case the Circuit Court of Appeals had plenary power to issue the writ:

"Judge Wilbur. It has been suggested here that you do not question the power of the Court to issue a writ of mandamus.

Mr. Howland. I was about to say, your Honor, under the doctrine of Whittel v. Roche, we have no desire to question the ultimate plenary power of this Court to issue the writ.

Judge Wilbur. As far as I know, that case has not been reversed yet.

Mr. Howland. I think not. The only question we would raise under the doctrine of that case, is whether such special

A like conclusion is reached, after a review of the authorities, in *Minnesota & Ontario Paper Co. v. Molyneaux* (8th C.C.A., 1934) 70 F. (2d) 545, 546-547:

> "One of the limitations of this section is to such writs of this character as 'may be necessary for the exercise of their respective jurisdictions.' The jurisdiction of the Court of Appeals is purely appellate. • • • Therefore Courts of Appeals can entertain such writs only where they are 'necessary for the exercise of' appellate jurisdiction. Whether such appellate jurisdiction exists is determined, not alone by the pendency of an appeal, but by whether the proceeding in the lower court to be affected by the writ is 'within the appellate jurisdiction of the higher court.' • • • Where such appellate jurisdiction exists, the necessary original writs may be entertained for any purpose necessary to protect the full exercise of that jurisdiction. One situation classed within such protection of appellate jurisdiction is where the right of appeal exists but because of the presence of 'circumstances imperatively demanding' a departure from the ordinary remedy by • • • appeal' • • • is necessary. In such situation, the writs may be employed 'as an auxiliary process, and • • • as a means of correcting excesses of jurisdiction, of giving full force and effect to existing appellate authority, and of furthering justice in other kindred ways.' • • •
>
> It has been repeatedly declared by the Supreme Court that various original writs 'cannot' be used as a substitute for appeal or writ of error. While this language ('cannot') was suited to the cases wherein used, it is evidently too broad for universal application because other decisions expressly recognize that

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circumstances exist in this case which would warrant the court in issuing the writ" (Transcript of Oral Argument in the Circuit Court of Appeals, pp. 23-24).

there are situations where the appropriate writ may be employed even though the remedy of writ of error or appeal exists. * * * From this situation it is clear that the appellate court has *jurisdiction* in every application for a writ—even where there is a remedy by writ of error or appeal—to determine whether the case is 'rare and exceptional' or * * * the record discloses 'any special circumstances' which justify 'a departure from the regular course of judicial procedure.' If such 'special circumstances' are found to exist, the court *may* issue the writ. If such are found not to exist, the court will refuse the writ for that reason. We construe this condition of the law as follows: The *jurisdiction* exists, but the granting of the writ is within the discretion of the court (Ex parte United States, 287 U.S. 241, 248, 53 S. Ct. 129, 77 L. Ed. 283), and an established rule of law limiting the exercise of that discretion is that the writ will not issue where the remedy of appeal exists (or existed), unless the record discloses such 'special circumstances' as to make it a 'rare and exceptional' case."

In *Barber Asphalt Pav. Co. v. Morris* (8th C.C.A., 1904) 132 Fed. 945, 956 (cited with approval by this Court in *McClellan v. Carland* (1910) 217 U.S. 268, 280) the court said:

"Finally, it is insisted that the writ of mandamus should not issue in this case because that writ may not be used to compel a subordinate court to reverse or revise its decision of a question properly submitted for its consideration in the progress of a case before it, or to direct it how to decide or by what rules to proceed. * * * It is undoubtedly the general rule that a court has no power by writ of mandamus to compel a subordinate judicial officer to reverse a conclusion already reached, to correct an erroneous decision, or to direct him in what particular way he shall proceed

or shall decide a specified question. But it is equally a part of this general rule that the court always has the power by means of such a writ to compel such an officer to proceed to try and decide a controversy within his jurisdiction, or to perform any other plain duty imposed by law. * * * The power to compel such an officer to proceed to the trial and determination of a case which it is his duty to hear and decide necessarily includes within it the power to compel him to reverse and set aside any erroneous decision he may have made to the effect that he will not proceed to such a trial and judgment."

In *Ex Parte Edelstein* (2d C.C.A., 1929) 30 F. (2d) 636, plaintiff applied to the Circuit Court of Appeals for mandamus after the trial court had dismissed the bill of complaint for lack of jurisdiction as to certain of the defendants. Sustaining its jurisdiction to issue the writ the court, speaking through Judge Learned Hand, said (p. 637):

"Both sides agree that the plaintiff cannot appeal from the decree dismissing the bill in part, and, as he has not discontinued the suit against Gillmore, Mitchell, and Dulzell, the first question is whether we have jurisdiction to issue a writ of mandamus. It is abundantly settled that we have, when it is necessary to protect our appellate jurisdiction, whether or not the cause be already before us on appeal * * *; but in the case at bar the District Court has already acted, and its decision will in season come before us for review, so that it might well be argued that the only service of the writ would be to expedite an appeal. Moreover, mandamus will not usually go when there is another remedy. On the other hand, the court has refused to entertain the case at all, and its

action does prevent our consideration of the merits which will not be before us on appeal from the decree. At any rate the Supreme Court in Re Hohorst, 150 U.S. 653, 14 S.Ct. 221, 37 L. Ed. 1211, took the second view under precisely similar circumstances to those at bar, and the decision, though several times cited, has never been questioned. While the power depended upon section 342 of title 28 of the Code (28 USCA § 342), it was ancillary to the appellate jurisdiction of the court (Insurance Co. v. Comstock, 16 Wall. 258, 21 L. Ed. 493); and, although our own power must rest upon section 377, we do not doubt that, if our appellate jurisdiction be involved, that section covers instances in which the Supreme Court would protect its own jurisdiction under section 342. We think, therefore, that we must decide the question presented to the District Court."

To the same effect are:

In re Lisman (2d C.C.A., 1937) 89 F. (2d) 898;

In re Babcock (7th C.C.A., 1928) 26 F. (2d) 153, 154-155 (cert. den. 278 U.S. 615);

Greiferbiehl v. Hughes Electric Co. (1923) 260 U.S. 735 (cert. den. 264 U.S. 489);

Grable v. Killits (6th C.C.A., 1922) 282 Fed. 185, 196 (cert. den. 260 U.S. 735).

All of these authorities apply the principle declared by this Court in *Adams v. United States ex rel. McCann*, No. 79 this Term, decided December 21, 1942, 87 L. Ed. 209, 211:

"Procedural instruments are means for achieving the rational ends of law. A circuit court of appeals is not limited to issuing a writ of habeas corpus only when it finds that it is 'necessary' in the sense that

> the court could not otherwise physically discharge its appellate duties. Unless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it. Undoubtedly therefore, the Circuit Court of Appeals had 'jurisdiction,' in the sense that it had the power, to issue the writ as an incident to the appeal then pending before it. The real question is whether the Circuit Court of Appeals abused its power in exercising that jurisdiction in the situation that confronted it."

At pages 32-33 of petitioners' brief it is suggested that if the decision below is upheld, "every ruling striking a plea in abatement or other preliminary plea, as well as every order overruling a demurrer to an indictment, would lay the basis for application for mandamus to the appropriate circuit court of appeals." This imagined evil is without substance. The authorities above cited make clear that the writ may issue only in exceptional cases and this limitation has been, and of course will continue to be, strictly observed.

Like considerations completely distinguish *Cobbledick v. United States* (1940) 309 U.S. 323, quoted at pages 31-32 of the Government's brief, and the other matters concerning criminal appeals set forth at page 34 of that brief. To sustain the right of an appeal from an interlocutory order in every case is far different from recognizing the power of an appellate court to issue mandamus in exceptional instances.

B. Section 1011 of the Revised Statutes (28 U.S.C. 879) Did Not Deprive the Circuit Court of Appeals of Power to Issue the Writ in This Case.

Petitioners contend that the Circuit Court of Appeals was without power to issue the writ of mandamus because of section 1011 of the Revised Statutes (28 U.S.C. 879), which provides:

> "There shall be no reversal in the Supreme Court or in a circuit court of appeals upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

The contention is that under this statute the Circuit Court of Appeals has no power to reverse for error in the trial court's ruling striking the pleas, because the error is one "in ruling [a] plea in abatement, other than a plea to the jurisdiction of the court"; that since the court is without power on appeal to reverse for error in the challenged ruling it had no power to correct the ruling on mandamus.

We submit that this contention is without merit for the reasons: (1) respondents' pleas are pleas to the jurisdiction of the court and are therefore within the express exception in the statute, (2) this statute does not apply to criminal proceedings, (3) if the statute were applicable it would only provide an additional reason why a writ of mandamus should issue, and (4) regardless of the meaning and application of R. S. 1011, the Act of May 9, 1942, removes any question as to the power to issue mandamus.

1. **Respondents' pleas are pleas to the jurisdiction of the court.**

The pleas in terms are pleas to the jurisdiction of the court. They allege that by reason of the facts therein set forth,

> "This court has no jurisdiction to entertain any proceeding against any of said defendants based on the indictment herein."[7]

The facts set forth and referred to in the pleas indisputably establish that this allegation of lack of jurisdiction in the court is well founded. If these facts are true, the grand jury had no power to return the indictment, and the purported indictment is **no indictment at all**. Without an indictment the court is without jurisdiction.

In *Ex parte Bain* (1887) 121 U.S. 1, the petitioner sued out a writ of habeas corpus, alleging that he had been tried on an indictment amended on motion of the Government after its return by the grand jury. This Court held that since the indictment was "no indictment of a grand jury" the court had no jurisdiction to try or convict the petitioner, saying (121 U.S., 13-14):

> "It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime, if

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[7] R. 46. This quotation is from the pleas of the defendants other than the Carnation Company. Like allegations with respect to the jurisdiction of the grand jury appear at pages 89 and 91 of the Enlarged Return. Similar allegations challenging the jurisdiction of the grand jury and of the court appear in the pleas of the Carnation Company (R. 40, 41).

[8] 28 U. S. C. 421, supra, p. 2; *United States v. Johnson* (7th C. C. A., 1941), 123 F. (2d) 111, 118, 120 (now pending before this Court, No. 5 this term; infra, p. 58).

> it were properly presented by indictment, **the jurisdiction of the offence is gone**, and the court has no right to proceed any further in the progress of the case for want of an indictment."

Directly in accord is the decision in *Albrecht v. United States* (1927) 273 U.S. 1, 8, where the Court, citing *Ex parte Bain*, held that

> "A person may not be punished for a crime without a formal and sufficient accusation even if he voluntarily submits to the jurisdiction of the court,"

and that a court "may acquire jurisdiction over the person of the defendant" only "When there was an appropriate accusation either by indictment or information, . . ."

There is, of course, no ground of distinction between an "indictment" which is no indictment at all because it has been amended, as in *Ex parte Bain*, supra, and an "indictment" which is no indictment at all because it was returned by a grand jury without power to return it. Having no power, the members of the jury do not act as a grand jury and the effect of their action is nothing more than if a group of bystanders had handed to the court a paper labeled "indictment."

In *Ex parte Farley* (C.C. Ark. 1889) 40 Fed. 66, a writ of habeas corpus was issued releasing petitioners who had been convicted on an indictment returned by an alleged grand jury for the United States court at Muskogee. In holding that the court had no power to summon a grand jury and therefore no jurisdiction to try the petitioners, the court said (40 Fed. 69):

> "Jurisdiction in a court to try a case means jurisdiction over the place, the person, and the subject-matter. **That there may be a subject-matter** there must be an act that is a crime, **and** this act must be properly and legally presented before a court. * * * Has the court at Muskogee the power to impanel a grand jury? If it has not such power, the grand jury that found this indictment was an illegal body, and it had no power to accuse any one by indictment. All courts of the United States, whether they be the supreme court of the United States, circuit courts, district courts, United States territorial courts in the territories, or the court for the Indian Territory, established by the act of March 1, 1889, are creatures of the constitution, and the statutes passed in pursuance thereof, and they have only such jurisdictional powers as are conferred by the constitution or by statute. Has the court at Muskogee the power to impanel a grand jury? If it has not this power, **there was no subject-matter properly presented** in the case of Farley and Wilson upon which the court could proceed to try them."

The decision in the *Farley* case was approved by this Court in *In re Mills* (1890) 135 U.S. 263, 267.

Like principles are stated and applied in the recent decision in *United States v. Johnson*, (7th C.C.A., 1941) 123 F. (2d) 111, 118, 120.

And see,

Stewart v. United States (9th C.C.A., 1926) 12 F. (2d) 524;

Stewart v. District Court (9th C.C.A., 1926) 16 F. (2d) 863 (cert. den.; 273 U.S. 755).

To the same effect is the decision of the Circuit Court of Appeals for the Fourth Circuit in *Renigar v. United States* (1909) 172 Fed. 646, where the court said (p. 658):

> "The indictment—and that means of course a valid indictment found and presented according to the settled usage and established mode of procedure—is a prerequisite to the jurisdiction of the court to try the person accused, an indispensable condition and requirement, the absence of which renders the proceedings not simply voidable, but absolutely void."

The cases cited by petitioners do not support their contention that the pleas in the case at bar are not pleas to the jurisdiction of the court within the meaning of section 1011 of the Revised Statutes. No one of these cases dealt with a violation of section 284 of the Judicial Code (28 U.S.C. 421);[3] no one of them involved a plea, such as those in the case at bar, setting up complete lack of power in the grand jury to return the indictment and the consequent lack of jurisdiction in the court.

In conclusion we point out that petitioners have from the beginning conceded that if the facts alleged in the pleas are true the grand jury had no power to return the indictment and the court no jurisdiction over the cause. Indeed, until the filing of the petition for rehearing counsel for the Government, in both brief and oral argument, consistently expressed the view that the pleas are

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[3]The only case in point under this statute is the decision of the Circuit Court of Appeals for the Seventh Circuit in *United States v. Johnson* (1941) 123 F. (2d) 111, hereinafter discussed, where the court held that a plea similar to the pleas here involved went to the jurisdiction of the grand jury and of the court and reversed the decision of the trial court for error in granting the motion of the Government to strike the plea.

pleas to the jurisdiction of the court. Thus, in oral argument before the Circuit Court of Appeals, Government counsel said (Transcript of Argument, p. 34):

> "Finally, the petitioners [respondents here] contend that if the facts they purport to allege in their plea in abatement are true, that the indictment is void and the court below is without jurisdiction. The argument is thoroughly sound.
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> * * * * * * * * *
>
> There is no question, your Honor, but what the authority of the grand jury to return a valid indictment depends upon that statute, and if they exceeded the terms of the statute, they had no authority to return the indictment. Therefore, the indictment must be void. And if the indictment is void, the court would be without jurisdiction to try the defendants on the charges contained in the indictment. I agree with that."

2. Section 1011 of the Revised Statutes (28 U. S. C. 879) does not apply to criminal proceedings.

While we submit that the foregoing establishes the lack of merit in petitioners' contention, we also point out that section 1011 of the Revised Statutes (28 U.S.C. 879) does not apply to criminal proceedings. So far as our research discloses, this point has never been presented to or considered by any court, but we believe its validity is clear in the light of the history of the statute.

Section 1011 of the Revised Statutes was derived from section 22 of the Judiciary Act of 1789 (c. 20, 1 Stat. 73, 84). This section, the provisions of which are copied in the footnote,[10] applied only to civil proceedings. When

[10] See. 22. *And be it further enacted*, That final decrees and judgments in civil actions in a district court, where the matter in

the Revised Statutes were enacted section 22 was divided into several sections but there was no substantial change in its phraseology.[11] Accordingly it seems clear that the meaning of the section was not changed and that its scope continued to be confined to the cases enumerated in section 22 of the Judiciary Act of 1789, that is, to civil cases. This conclusion inevitably follows from the decision in

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dispute exceeds the sum or value of fifty dollars, exclusive of costs, may be re-examined, and reversed or affirmed in a circuit court, holden in the same district, upon a writ of error, whereto shall be annexed and returned therewith at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and prayer for reversal, with a citation to the adverse party, signed by the judge of such district court; or a justice of the Supreme Court, the adverse party having at least twenty days' notice. And upon a like process, may final judgments and decrees in civil actions, and suits in equity in a circuit court, brought there by original process, or removed there from courts of the several States, or removed there by appeal from a district court where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs, be re-examined and reversed or affirmed in the Supreme Court, the citation being in such case signed by a judge of such circuit court, or justice of the Supreme Court, and the adverse party having at least thirty days' notice. But there shall be no reversal in either court on such writ of error for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or such plea to a petition or bill in equity, as is in the nature of a demurrer, or for any error in fact. And writs of error shall not be brought but within five years after rendering or passing the judgment or decree complained of, or in case the person entitled to such writ of error be an infant, *feme covert*, *non compos mentis*, or imprisoned, then within five years as aforesaid, exclusive of the time of such disability. And every justice or judge signing a citation on any writ of error as aforesaid, shall take good and sufficient security, that the plaintiff in error shall prosecute his writ to effect, and answer all damages and costs if he fail to make his plea good."

[11] Section 1011 of the Revised Statutes was not enacted in the Judicial Code. It is however retained in the United States Code, with the reference to the circuit court changed to the circuit court of appeals. See 28 U. S. C. A. 879, where there is an editorial comment pointing out that the section was omitted from the Judicial Code and raising the question whether it is presently in force.

Buck Stove Co. v. Vickers (1912) 226 U.S. 205, where the court held that section 1011 does not apply to writs of error from state courts. In reaching this conclusion the court said (p. 213):

> "The provision [R.S., 1011] originated in that section [section 22 of the Judiciary Act] and was there associated with other provisions which unmistakably show that it was intended to embrace only writs of error to the circuit and district courts. At the time of the revision in 1873, § 22 was divided into several shorter sections and included in the revision according to an arrangement, adopted for purposes of convenience only, whereby the several parts of the original section became more or less separated; **but that in the absence of some substantial change in phraseology, did not work any change in their purpose or meaning**. Rev. Stat., § 5600; *Hyde v. United States*, 225 U.S. 347, 361; *McDonald v. Hovey*, 110 U.S. 619. This is a writ of error to a state court, and so our power to review the ruling upon the plea in abatement is not affected by § 1011."

Section 5600 of the Revised Statutes, referred to in the above quotation, provides:

> "The arrangement and classification of the several sections of the revision have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no inference or presumption of a legislative construction is to be drawn by reason of the Title, under which any particular section is placed."

In accord is

Hyde v. United States (1912) 225 U.S. 347, 361.

It is true that section 1011 (28 U.S.C. 879) has been mentioned in a comparatively few decisions on writs of error seeking review of rulings on pleas in abatement in criminal proceedings. These cases are cited at page 21 of the Government's brief. In virtually all of these cases the statute was applied as a secondary ground of decision after the appellate court had considered the merits and independently sustained the ruling of the trial court. Moreover, in none of these cases was the point considered; in none were the compelling considerations now before this court presented. These cases are "entitled to no more weight by way of precedent than the [erroneous] exercise of appellate jurisdiction *sub silentio*" (*United States v. Sanges* (1892) 144 U.S. 310, 319-321). We call particular attention to the *Sanges* case because in that case this Court, notwithstanding its prior inadvertent exercise of jurisdiction in certain criminal cases, refused to treat those cases as precedents and announced appropriate jurisdictional limitations when the question of its jurisdiction was raised for the first time.

The conclusion that the statute does not apply to criminal appeals is strongly fortified by the fact that in many cases this Court and the circuit courts of appeals have reversed for errors in rulings on pleas in abatement without any reference to section 1011.

See, for example:

Crowley v. United States (1904) 194 U.S. 461;

United States v. Johnson (7th C.C.A. 1941) 123 F. (2d) 111;

Dunn v. United States (5th C.C.A. 1917) 238 Fed. 508;

Breese v. United States (4th C.C.A. 1906) 143 Fed. 250.

In numerous other cases this Court (e.g., *Agnew v. United States* (1897) 165 U.S. 36), and the circuit courts of appeals (e.g., *Olmstead v. United States* (9th C.C.A. 1927) 19 F.(2d) 842, 844-846; *United States v. Parker* (3d C.C.A. 1939) 103 F.(2d) 857, 859-860), have passed upon the merits of rulings on pleas in abatement in criminal cases and have affirmed those rulings on the merits without mention of the statute.

3. If Section 1011 of the Revised Statutes were applicable this would provide an additional reason why mandamus should issue.

Petitioners argue that if the court below cannot reverse on writ of error (appeal) for error in the ruling of the trial court on the plea, it has no power to correct the ruling by mandamus. The contrary, we submit, is true. The test of the **power** of the court to issue mandamus is whether the "case" in which the ruling occurs is one within its appellate jurisdiction (*Ex parte United States* and other cases cited and quoted at pp. 18-28, supra). The fact that such a ruling (as is true in the case at bar) may ultimately be reviewed on appeal from the final judgment does not prevent the issuance of mandamus where special circumstances warrant the exercise of the power to issue the writ (see pp. 17-28, supra). But if such a ruling is not reviewable at all, then this in itself is a special circumstance which warrants the issuance of the writ. In *Maryland v. Soper* (1926) 270 U.S. 9, the fact that the state under no circumstances could obtain review on writ of error of the order of the district court refusing to remand the case was the principal reason this Court

exercised its power to issue the writ. A like consideration moved the Court to issue the writ in *Ex parte Bradley* (1868) 7 Wall. 364, 376, and *Ex parte Robinson* (1873) 19 Wall. 505, 513; 19 Wall. 513, 514, where the rulings complained of were orders of the lower courts disbarring attorneys. No appeal or writ of error lay to review such orders.

And see:

Virginia v. Rives (1879) 100 U.S. 313, 323 (also the concurring opinion of Mr. Justice Field, at pages 327-330);

Travelers' Protective Ass'n v. Smith (4th C.C.A., 1934) 71 F.(2d) 511, 512-513;

Ex parte United States (1932) 287 U.S. 241, 246.

The only authorities cited by petitioners in support of their position that section 1011 of the Revised Statutes prohibits the issuance of mandamus in this case are cases dealing with section 28 of the Judicial Code (28 U.S.C. 71). That statute, however, is entirely different. It provides:

> "Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, **such remand shall be immediately carried into execution**, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

In holding that this statute took away the remedy by mandamus as well as by appeal and writ of error, this

Court said (*In re Pennsylvania Co.* (1890) 137 U.S. 451, 454):

> "In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and **it is unquestionably a general rule, that the abrogation of one remedy does not affect another.** But in this case, we think it was the intention of Congress to make the judgment of the Circuit Court remanding a cause to the state court final and conclusive. The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' **in addition** to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."

Section 1011 of the Revised Statutes contains no language like that in section 28 of the Judicial Code—"such remand shall be immediately carried into execution"—which indicates an intent to take away the remedy by mandamus. The decision in *In Re Pennsylvania Co.*; far from casting doubt upon the power of the court to issue the writ, is an authority strongly in support of that power.

4. The Act of May 9, 1942, removes any question as to the power of the court below to issue mandamus.

The Act of May 9, 1942, amending the Criminal Appeals Act of 1907 (18 U.S.C. 682; 28 U.S.C. 345), provides for appeals by the United States to circuit courts of appeals

> "From a decision or judgment quashing, setting aside, or sustaining a demurrer **or plea in abatement** to any indictment * * * except where a direct appeal to the Supreme Court of the United States is provided by this Act."

Since the enactment of this statute no question can remain as to the power of the court below to issue mandamus. The writ directs the trial court to proceed to an adjudication, which, if adverse to the Government, may be reviewed directly by the Circuit Court of Appeals. The power to issue the writ in this situation is settled.

Ex parte United States (1932) 287 U.S. 241;
McClellan v. Carland (1910) 217 U.S. 268, 280;
Barber Asphalt Pav. Co. v. Morris (8th C.C.A., 1904) 132 Fed. 945, 955.

Ex parte United States, first above cited, is directly in point. There the district court had made an order denying an application for the issuance of a bench warrant. No review of this order could be had by the United States (or defendant) at any time. Nevertheless, on the Government's application, this Court issued mandamus directly to the district court, commanding that court to set aside its order and to issue the warrant. Answering a challenge to its power, the Court said (287 U.S., 246):

> "Perhaps it would be enough to satisfy the test afforded by these decisions to point to the limited authority of this court under c. 2564, 34 Stat. 1246,

> U.S.C., Title 18, §682 (U.S.C. Title 28, §345) [the Criminal Appeals Act] to exercise direct appellate jurisdiction to review a decision of the district court in the possible event that some action of that court might give rise to a right of review at the instance of the government. We prefer, however, to put our determination upon the broader ground that, even if the appellate jurisdiction of this court could not in any view be immediately and directly invoked, the issue of the writ may rest upon the ultimate power which we have to review the case itself by certiorari to the circuit court of appeals in which such immediate and direct appellate jurisdiction is lodged."

The scope of this ruling is evident when it is remembered that the United States—at whose suit the writ of mandamus issued—could not have appealed to the Circuit Court of Appeals. Appeals by the United States in criminal cases are confined to those provided in the Criminal Appeals Act (now amended by the Act of May 9, 1942). The case could have been taken to the Circuit Court of Appeals and thereafter to this Court on certiorari only if the defendant appealed after final judgment.

For each of the foregoing reasons we submit that the court below had power to issue the writ of mandamus and correctly did so if there are present in this case such "special circumstances" as appropriately moved the court to exercise its discretion to that end, and we turn to that question.

C. There are present in this case "special circumstances" which sustain the exercise of discretion by the court below in issuing the writ of mandamus.

Among the "special circumstances" which have been held sufficient to require the exercise of the power to issue a writ of mandamus are the following—all of which are present in this case:

(1) That the action of the trial court has denied respondents the right to trial by jury.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U. S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86;
Whittel v. Roche (9th C.C.A., 1937) 88 F.(2d) 366, 371.

(2) That the questions presented involve matters of public importance in the administration of justice.

Ex parte United States (1932) 287 U.S. 241;
Los Angeles Brush Corp. v. James (1927) 272 U.S. 701;
McCullough v. Cosgrave (1940) 309 U.S. 634.

(3) That the matters presented involve the jurisdiction of the trial court.

Virginia v. Rives (1879) 100 U.S. 313, 323;
Ex parte Bransford (1940) 310 U.S. 354, 355;
Ex parte Northern Pac. R. Co. (1929) 280 U.S. 142;
Stratton v. St. Louis S.W. Ry. (1930) 282 U.S. 10, 16.

(4) That no appeal lies from the challenged order and if the parties are remitted to relief on appeal

from a final judgment they and the courts will be subjected to the burden of a long and expensive trial which ultimately must be held to have been required under a mistake.

Ex parte Simons (1918) 247 U.S. 231;
Ex parte Peterson (1920) 253 U.S. 300;
Ex parte Skinner & Eddy Corp. (1924) 265 U.S. 86.

1. By the action of the trial court respondents have been denied a jury trial on their pleas.

Under the rule obtaining at common law[12] and preserved by the Constitution and statutes of the United States, respondents became entitled, upon the joinder of issue by the Government, to a trial by jury on their pleas.[13] They demanded a jury trial, their right to it was conceded by government counsel, and the court set the case down for jury trial (R. 9). Thereafter respondents' right to a jury trial on these pleas was denied by the action of the court

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[12] "When the issue is joined upon a plea in abatement or replication thereto, the venire may be returned, and the trial of the point by a jury of the same county proceed instanter."
Wharton's Crim. Law, 5th Ed., 1861, sec. 537, p. 249.
And see:
4 Bl. Com. (15th Ed.) c. 26, III, p. 334;
1 Chitty, Criminal Law (3d Am. Ed. 1841) 450.

[13] Constitution, Article III, section 2, clause 3;
Constitution, Amendment VI;
R.S., sec. 566 (28 U.S.C. 770), derived from sec. 9 of the Judiciary Act of 1789, 1 Stat. 76;
Heike v. United States (1910) 217 U.S. 423, 427;
Jones v. United States (9th C.C.A., 1910) 179 Fed. 584, 592;
Mulloney v. United States (1st C.C.A., 1935) 79 F.(2d) 566, 573;
United States v. Shaw (S.D. Cal., 1940) 33 F. Supp. 531, 532;
Cyc. Fed. Proc., Vol. 5, §2143, p. 592.

in striking the pleas. No appeal lies from this ruling; mandamus is the **only** remedy available to respondents to preserve to them their right to a jury trial.

It is no answer, as pointed out in *Ex parte Simons, Ex parte Peterson,* and other like cases (supra, pp. 18-20), that respondents will, after reversal and remand on final judgment, obtain a jury trial. If the court's order refusing to reinstate the pleas and set them down for jury trial is erroneous it should " 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake' " (*Ex parte Peterson,* supra, 253 U.S., 306).

Nor is it an answer, as the Government suggests, that respondents may be acquitted and thus have no need to appeal. Indeed, this emphasizes the appropriateness of the writ, for if respondents are acquitted they nevertheless will have been improperly subjected to a trial on the merits and will forever have been denied their right to a jury trial of the pleas, a right which, under the admitted allegations of the petition for mandamus, is of great value (see p. 54-57, infra).

2. The questions presented involve matters of public importance in the administration of justice.

If the facts alleged in the pleas in the case at bar are true, as the record facts plainly indicate, it cannot be questioned that the most fundamental civil rights of the defendants are involved. The right of an individual not to be called upon to answer a criminal charge until a duly

constituted tribunal has passed upon the question whether he should be brought to trial is as fundamental as the right to a trial itself.

> "The comment has so often been made as to make its reiteration unnecessary that every one threatened with the charge of the commission of a crime has two rights. One is, of course, the right to a fair and impartial trial upon which the question of his guilt is determined; the other is the no less valuable right, and practically the more valuable right, that he shall not be even called upon to answer to a criminal charge until some duly constituted tribunal has passed upon the preliminary question of whether he ought to be brought to trial" (*United States v. Fitzgerald* (E.D. Pa., 1928) 29 F.(2d) 573, 574).

In *United States v. Pardue* (D.C. Tex., 1923) 294 Fed. 543, the court, speaking through Judge Hutcheson, said (p. 548):

> "This court is entirely sensible of the necessity for apprehending criminals, of the advantage of having criminals suffer for their offenses; but it is equally sensible that there is a higher obligation on government than that of catching one more or less offending criminal—the obligation of keeping faith with the individual. * * * when men are convicted of offenses against their government, and in the process of that conviction every right which the genius of their country gives them is extended—they can but submit. When, however, they are convicted through a denial of a substantial right extended to them by their government, they can but despair; and when courts permit a construction of the law which makes the government break faith with individuals, whether offenders or not, then the reason for courts has ceased, and justice is no more."

It is particularly appropriate that these safeguards to liberty should be maintained in cases of the character of the one before this Court, where the criminal indictment has been used as the real punishment. We quote from *Antitrust in Action*, written by Walton Hamilton, one of the attorneys of the Antitrust Division, and published as Monograph No. 16 by the Temporary National Economic Committee, of which former Assistant Attorney General Arnold was a member (pp. 33, 53, 80):

> "As any advocate preparing for a legal bout, **the Antitrust attorney seizes whatever is helpful, discards whatever might tell against him,** draws items together into a purposive picture. He gathers evidence instead of finding facts: pieces together a conspiracy rather than dissects trade practice.
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> * * * * *
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> **Thus the grand jury has a peculiar role in antitrust.** Its traditional task is to present infractions of the law; the function of industrial analysis has been grafted upon it. In the development its initial office has passed into eclipse. Nominally, the grand jury has the power to indict or refuse to indict; in reality it usually does the will of the prosecuting attorney into whose hands the real discretion has passed.
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> It is, in fact, the criminal indictment, rather than its event in pecuniary penalty or prison sentence, which looms largest in the minds of executives. No respectable citizen wishes to have his name attainted by a formal charge of crime. None relishes the discomfort, the routine, the anxiety of the process of arraignment; none wishes to be fingerprinted in the manner accorded the ordinary criminal. **Thus the stigma of the indictment tends to be the real punishment. The actual penalty comes at the beginning, rather than the end,**

of the trial. The effect is to punish by presumption and not by proof. The accused is branded with the hypothesis of guilt, which in the office, at the club, on the golf links he must rebut as best he can. **The judgment emerges from the verdict of the grand jury; it derives from an ex parte process in which he is not heard in his own behalf."**

But beyond the individual rights of the respondents, there are here involved matters of greatest public importance in the administration of justice. The record establishes a clear abuse of the purposes of section 284 of the Judicial Code (28 U.S.C. 421, quoted supra p. 2). By the unqualified admissions of government counsel, it appears that the prosecuting officers of the Government presented a petition to the district judge representing that certain investigations had been begun; obtained an order granting this petition and continuing the grand jury for the **sole** purpose of completing these investigations; and then submitted to that grand jury matters as to which no investigation had been begun at the time the petition was filed and which therefore were not within the scope of the court's order.

In addition, it appears—again from the admissions of government counsel—that no investigation of any of the matters or defendants in this indictment was begun at any time during the original term of the grand jury, and that the statute—wittingly or otherwise—has been used as a cloak for an abuse of the grand jury process. The provisions of the statute thus violated are not mere formal requirements. The purpose of the provisions allowing the continuance of the grand jury is clear: to avoid the waste of time and effort which would follow upon the expiration of a term in the middle of a bona fide investiga-

tion by a grand jury. The purpose of the **limitation** in the statute is equally clear: no prosecuting officer should be permitted, **for reasons of his own**, to retain in existence any particular grand jury. Such power would be no different from the inadmissible power of a prosecuting officer to select the original members of the grand jury; it would be subversive of the fundamental purposes of the grand jury—to safeguard individuals from official oppression through unfounded prosecution, and to deprive prosecuting officers of the power or opportunity to act oppressively or corruptly.

See

United States v. Lewis (E.D. Mo., 1911) 192 Fed. 633, 638-640.

We submit that the prosecution in this case—by reason of the foregoing, and by reason of its constant shift of position and its resort to technicalities to evade the disclosure of the simple facts which determine the validity of this indictment—has misconceived its duties and taken a position which ought not to be supported. We need not repeat the extraordinary facts which we have already set forth in the statement of the case (pp. 5-14, supra). In both courts below the Government sought to justify its conduct by invoking the policy relating to the secrecy of grand jury proceedings. This position the court below correctly rejected,[14] and it has been abandoned in this Court.

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[14] "Grand Jury testimony is ordinarily confidential • • •. But after the Grand Jury's functions are ended, disclosure is wholly proper where the ends of justice require it." (*United States v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150, 234. Numerous cases which we cited to the court below are in accord.)

This Court has stated the duties of a prosecuting officer (*Berger v. United States* (1935) 295 U.S. 78, 88):

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

In accordance with these salutary principles the Government of the United States should not, we submit, resort to technicalities to evade the disclosure of truth; its effort, equally with that of defense counsel, should be directed to having the facts ascertained. The validity of these views in the extraordinary circumstances of this case are, we believe, self-evident and they have authoritative support.

In *Edwards v. United States* (1941) 312 U.S. 473, defendant pleaded in bar that he had appeared before the Securities and Exchange Commission in response to a subpoena and "'after having claimed his immunity against self incrimination, * * * under compulsion, testified under oath, * * * concerning [matters] * * * which are the subject matter of this prosecution * * *.'" (312 U.S., 475). At the time this plea was filed defendant renewed a re-

quest, theretofore refused, for a transcript of his testimony. The trial court denied this request and overruled the plea. In reversing this ruling this Court said (pp. 480, 481, 482):

> "As appears from the preceding statement of the case, the trial court overruled not only the plea in bar but petitioner's motion for production of the transcript, which was certainly the best evidence of whether the testimony before the Commission was sufficiently related to the prosecution to support amnesty.
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> We find nothing in this record to indicate the desirability of secrecy so far as the testimony of petitioner is concerned.
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> The refusal to permit the accused to prove his defense may prove trivial when the facts are developed. Procedural errors often are. But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions or else the impression of the judge arising from sources outside the record dominates results. The requirement that allegations must be supported by evidence tested by cross-examination protects against falsehood. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden."

In *United States v. Central Supply Ass'n* (1941) 37 F. Supp. 890, defendants filed a plea in abatement upon the ground, among others, that the grand jury was improperly influenced by the conduct of an excessive number of Special

Assistants to the Attorney General who appeared before the grand jury in connection with the investigation. The court held that these allegations raised issues of fact sufficient to put at issue the validity of the indictment, but that the pleas could not be sustained because they were not sufficiently supported by the facts of record upon which the verifications were based. **However,** the court allowed the defendants additional time for the filing of supplemental affidavits, saying:

> "If the law has been violated by the grand jury in returning the indictment, the defendants should not and will not be required to answer its charges" (p. 893).

And in connection with the conduct of the grand jury proceedings the court said (p. 894):

> "If the defendants or their counsel, or if any of the grand jurors, counsel for the government, or other officers of this court, know of any facts which indicate a violation of the law or the instructions of this court by the grand jury, it is their duty to inform the court. The court wishes to be secure in the feeling that no defendant will be held to answer an unlawful indictment. And the defendants have a right to share such feeling."

In *United States v. Molasky* (7th C. C. A., 1941) 118 F. (2d) 128, 133, Molasky filed a plea in bar claiming immunity by reason of his testimony before the grand jury. In reversing a ruling by the district court dismissing this plea, the Circuit Court of Appeals said (p. 135):

> "The contention that the plea is not sufficiently specific, in stating Molasky's grand jury testimony, places the Government in a rather awkward position.

> It must be remembered that the detailed testimony of a witness before a grand jury is in the possession of the Government and not the witness. That situation is well illustrated in the instant case. Molasky and some of the other defendants attempted by petition to obtain the minutes of the grand jury so that they might determine the propriety of a plea in bar. We have held that this request was properly denied. It is our view, however, when the instant plea in bar was presented, that the Government should have been required to take issue thereon. It had possession of the grand jury minutes, and it alone was in a position to disclose any misrepresentation in the plea. In no other manner could the assertions contained in the plea be dispelled."

3. The questions presented involve the jurisdiction of the trial court.

If the facts alleged in the pleas are true, the indictment is void and the trial court is proceeding in a cause over which it has no jurisdiction (see pp. 30-34, supra). The authorities heretofore cited (p. 43, supra) hold that in this situation the court may appropriately exercise its discretion to issue the writ. We do not contend, as the Government suggests (Brief, pp. 16, 17), that the District Court did not have jurisdiction to determine the sufficiency of the pleas, nor, of course, that that court does not have jurisdiction to try the pleas. In all cases in which jurisdiction is considered the court must make a determination, which clearly is within its power, to determine its own jurisdiction. This may involve a mere consideration of pleadings; ofttimes it involves a trial of issues of fact upon pleas in abatement to the jurisdiction of the court.

See, for example,

Mexican Central Railway v. Pinkney (1893) 149 U.S. 194, 207-209;

Goldey v. Morning News (1895) 156 U.S. 518, 520.

Thus, in the former case this Court said (p. 209):

> "In the present case, when it was established by the facts stated in the plea in abatement, * * * that the plaintiff in error was never brought before the court by any proper or legal process, the Circuit Court was without jurisdiction to proceed in the case; * * *"

The pertinent consideration here is that if the pleas in this case are valid the court is without jurisdiction and all that occurs from this point on must ultimately be held for nought.

4. The ruling of the trial court, if not corrected by mandamus, will uselessly impose upon respondents and the courts the burden of a long and expensive trial.

The hardship and expense which would attend a trial on the merits of this case are extraordinary. Respondents, the defendants in the indictment, are forty-three corporations, associations and individuals comprising by far the greater part of the evaporated milk industry of the United States. They reside in all parts of the United States from New York to San Francisco and from Seattle to San Diego. The indictment covers activities of this large industry in ten western states, Puerto Rico and Alaska, for a period of more than six years. It includes the activities of manufacturers, jobbers, brokers, retailers, and trade associations. Many thousands of separate documents relating to the case already have been subpoenaed from the files of respondents throughout the United States. The

records of the Evaporated Milk Industry (the office operating under the Department of Agriculture) pertinent to the trial of this case, consist by themselves of thousands of documents. It is believed that a trial on the merits would take not less than four months and probably much longer, and would cost a large sum of money (R. 10). Cases of this kind—the so-called "industry indictments"—have exceeded in time and expense any other trials in the history of the Anglo-American law. In *Antitrust in Action*, supra, page 47, Mr. Hamilton of the Antitrust Division points out that the cost to defendants of defending the *Madison Oil Antitrust Case*[15] was between $2,000,000 and $2,500,000. The *Aluminum Antitrust Case*,[16] recently completed, and in which all defendants were exonerated of all charges, cost according to estimates of defendants' attorneys more than $2,000,000 to defend, lasted more than three years, and consumed 364 court days. Of this case the publicity releases of the Antitrust Department itself said:

> "The record of the testimony has reached the unprecedented figure of more than 40,000 pages, in addition to nearly 10,000 pages of exhibits. As the trial has progressed, counsel have been obliged to bring new tables and shelves into the courtroom to hold the growing volumes of the record. When the trial ended today the record covered thirty-two feet."

And again:

> "The Aluminum trial was more than twice as long as the Sugar Institute prosecution conducted in New York in 1933. That trial took six and one-half months of trial days and up to that time was the longest trial in the United States."

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[15] *U. S. v. Socony-Vacuum Oil Co.* (1940) 310 U.S. 150.

[16] *United States v. Aluminum Co. of America* (1941) 44 F. Supp. 97.

During the entire period covered by the indictment respondents in the present case were operating under a license issued by the Secretary of Agriculture under the Agricultural Adjustment Act and the Agricultural Marketing Agreement Act (R. 10); indeed, the very day (June 1, 1935) on which the Secretary of Agriculture promulgated the (compulsory) Licensing Agreement is the day alleged in this indictment as the date of the commencement of the alleged illegal conspiracy. At a trial on the merits it would be necessary to call not only the individual respondents and other members of the industry, but also the officials of the Department of Agriculture under whom the license was administered.

The rule that the burden of trial ordinarily is insufficient to warrant a court in issuing a writ of mandamus was announced at a time when trials such as the one facing respondents in this case were unknown to o[illegible] law. Moreover, the burden of such a trial ought not to be considered from the standpoint of respondents alone. If the facts alleged in respondents' pleas are true, a trial on the merits would be a gross and shocking waste of time and expense to the courts and the Government, as well as to respondents. This very point was one of the principal reasons given by this Court for the exercise of the power to issue mandamus in *Ex parte Simons* (1918) 247 U.S. 231, *Ex parte Peterson* (1920) 253 U.S. 300, and *Ex parte Skinner & Eddy Corp.* (1924) 265 U.S. 86.

The public interest is now further involved by reason of the fact that a useless trial would seriously impair war service of the greatest importance being rendered by respondents (R. 71).

These facts, we emphasize, are not advanced to suggest that violations of law should not be punished because of the hardship of trial or because particular defendants happen to be engaged in activities of importance in the prosecution of the war. They are advanced solely in support of the eminently valid position that respondents and the courts should not be put to the burden of an excessively long and costly trial on the merits **if ultimately it must be held that that trial was utterly futile because the indictment from the very beginning was void.**

The question whether the indictment is void is one which can be determined in a matter of hours.

II.

THE ORDER OF THE DISTRICT COURT STRIKING THE PLEAS WAS ERRONEOUS.

In this section of its brief the Government contends that if the Circuit Court of Appeals had jurisdiction to issue mandamus, it still should not have issued the writ, because the District Court's ruling striking the pleas was right. To prove the ruling right, the Government argues (a) that the pleas were formally defective and failed to show a violation of the statute,[17] or of the court's order continuing the authority of the grand jury,[18] and (b) that if such violation were shown, it would be legally immaterial.

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[17]Section 284 of the Judicial Code, quoted supra, p. 2.
[18]R. 48, quoted supra p. 7.

A. The pleas allege facts showing violation of (1) section 284 of the Judicial Code, and (2) of the court's order continuing the authority of the grand jury.

Referring to the jurisdictional defense based on the statute, the pleas allege in express terms that no investigation was begun in the November 1940 Term or prior to the March 1940 Term (Carnation Company's pleas, R. 39, 40; other defendants, R. 44, 46).

In *United States v. Johnson* (7th C.C.A., 1941) 123 F. (2d) 111, pleas similarly alleged (p. 117):

> "• • • that 'no investigation of said matters was begun at the December 1939 Term,' and 'the investigation of said matters was first begun at said March 1939 Term of Court.'"

In holding these allegations sufficient, the court said (p. 120):

> "We are not unmindful of the rule invoked by the Government that pleas in abatement and those of a kindred nature must be strictly construed. Facts must be stated, not conclusions. Here, however, the allegations were direct and positive. It is difficult to see how they could have been more specific. The challenge went to the very heart of the authority of the Grand Jury to act. The Government's motion to strike should have been overruled and the Government required to answer. The defendants were entitled to an opportunity to offer evidence in support of the motion and plea."

See also,

Edwards v. United States (1941) 312 U.S. 473, 479-482.

Presumably, therefore, if the pleas had stopped with the allegation that the investigation was not begun in the November Term that would have been sufficient. The Government's point is that additional evidentiary facts are pleaded which are not consistent with the ultimate allegation.

But in drawing the pleas respondents faced the requirement, which in fact the Government later relied upon, that sufficient evidentiary facts to show cause for the allegations must be pleaded in a case like this. As stated by the Circuit Court of Appeals (R. 133):

> "It is claimed by the respondent [the Government], however, that in order to present a proper plea the petitioners [respondents in the Supreme Court] could not rely upon the general allegation that no investigation had begun prior to the expiration of the term in which the jury was impaneled, because the proceedings of the grand jury are secret and it must be assumed that unless otherwise alleged the defendant had no information on which to base the general allegation."

After making the above statement the Circuit Court of Appeals went on to say (R. 133):

> "Assuming without deciding that this is true, a careful consideration of the allegations in the pleas indicates that the petitioners had good ground for their allegations. We do not intend to set up these allegations in detail, but they are based upon the statements of the United States attorney that the 'investigation' did not begin until the 28th day of February, two days before the end of the term in which the jury was impaneled and upon the minutes of the grand

jury for the 27th and 28th of February which were disclosed by the United States in response to the demand of the petitioners."

The Circuit Court of Appeals also said (R. 134):

"We conclude that the petitioners allege sufficient evidentiary facts to justify their general allegation that the investigations of their alleged crimes were not begun before the end of the term in which the jury was impaneled, and that the government's denial raised a factual issue which should be tried."

The evidentiary facts to which the Circuit Court of Appeals referred, which are all stated or referred to in the pleas, include not only the facts shown by the minutes which alone are sufficient to show probable cause (infra, pp. 62-63), but also the facts established by the proceedings in open court. These have already been summarized in the statement of the case in this brief (supra, pp. 5-16). Without repeating everything there said, the following high lights may be restated.

The commencement date of the investigation was first put around November 6, 1940, early in the November Term (R. 5, 30-31):

But if this were the date, then the indictment had been returned by a grand jury whose personnel had been changed in the middle of the investigation, because at the end of the November Term five grand jurors were excused and five new persons added (R. 26-27). This fact, coupled with the record of absences by grand jurors during the sessions (R. 37-38), proved that probably a majority and certainly a substantial number of the grand jurors had

not participated in all the proceedings on which the indictment was presumably founded.

Respondents seasonably made this point; to meet it government counsel shifted position and stated that only "routine matters" were considered in the November Term (R. 6), and that the investigation of this case commenced on February 28th, the last day on which the grand jury sat at that term (R. 32).

But by petition previously filed on February 26th (R. 22-23) the Government had alleged that "certain investigations *have been begun*" (R. 47) by the grand jury and had asked the court to authorize the grand jury to continue to sit during the March 1941 Term "solely to finish said investigations begun but not finished" (R. 4, 47; quoted supra, p. 6). The contentions that this investigation was commenced on February 28th, but was nevertheless included within the pending proceeding mentioned in the petition of February 26th, are, of course, irreconcilable.

Having given the date as February 28th, government counsel also stated it as "on or about February 28th" (R. 33). Pressed to be more specific, government counsel put the date at February 27th, and in so doing read the purported extract from the grand jury minutes already referred to (R. 33):

> "Mr. Dunne. Would you give us a date, because 'on or about February 28th' would indicate that it might not have been until March 1st.
>
> Mr. Burdell. That is just what I am about to do. By order of your Honor I was able to get the grand jury minutes at recess. Now, on February 28th—now, I have before me the minutes of the grand jury dated

February 28th. In these minutes the following recitation appears:

'Minutes of the previous meeting read and approved, as corrected (see below).' Then below it says: 'The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food industries were suggested for investigation, and investigation of Sugar Beet Industry was begun.'

These refer back to the February 27 minutes, so, as I understand these minutes of the grand jury the investigation was begun on February 27."

This gets us down to the whole nub and essence of the Government's point as now made to this Court, i.e., that since the pleas refer to these minutes, and since the minutes list the "Evaporated Milk Industry" among the industries named therein and also state "investigation begun," respondents are bound by the recital in the minutes and cannot allege that the investigation was not begun.

Would a court or jury trying the issue be bound by the words "investigation begun"? Would it be bound notwithstanding that the minutes containing these words were signed (time unknown) after the event by a person who was not the Foreman of the grand jury at the time (supra, p. 14)? Would it be bound to disregard previous inconsistent and conflicting statements of government counsel, all irreconcilable with the minutes? Would it be bound to disregard the allegation in the Government's

petition of February 26th? Would it be bound to find as a fact that the "mention" of "the Evaporated Milk Industry," along with more than a dozen other nationwide industries, conclusively established the commencement of an investigation against any of these respondents or with respect to any matter mentioned in this indictment? What investigation of a dozen or more nationwide industries could be begun in any substantial sense on a single day, so as to justify holding over a grand jury rather than empaneling a new one?

This case deals with a statute definitely limiting the power of a court to continue the existence of a grand jury. The statute speaks in jurisdictional terms. It says that the court may "authorize" the grand jury to continue to sit at succeeding terms, not over eighteen months in all, "solely to finish investigations begun but not finished by such grand jury." Could the court continue the grand jury's life for more than eighteen months, and would an indictment after the eighteen months be valid? If not, as is obvious, then an indictment must be invalid if returned in violation of the provisions in the same sentence of the statute, which limit the subject matter of continuing authority to matters previously begun but not finished. If such indictment is invalid under the statute, it certainly cannot be validated on any theory that courts, juries and defendants are conclusively bound by a recital in the minutes "investigation begun," in the face of facts showing that the investigation was not begun. Furthermore, if the statute has a practical purpose, and is, as we contend, to be enforced according to its terms, then the mere mention

of an industry in the grand jury's minutes cannot authorize investigation of all persons everywhere having any connection with that industry, as the Government's contention necessarily implies.

The Government's brief now suggests (pp. 41-42) that it is "possible" that the Government brought F.B.I. investigators before the grand jury on February 27, 1941, to make the start of an antitrust case against "particular industries." For the reasons given, we submit that this would not show compliance with the statute so as to warrant action against these respondents even if true. Beyond that, the statement is pure supposition, and has, we submit, no proper place in the Government's brief. The Government, and the Government only, knows what happened on February 27th. Notwithstanding repeated requests it has steadfastly refused to tell, for reasons held unsubstantial by the court below. In these circumstances it is not entitled, we submit, to ask this Court to treat suppositions as fact to defeat a trial on these pleas. (See *Edwards v. United States*; *United States v. Central Supply Ass'n*, and *United States v. Molasky*, cited and quoted at pp. 50-53, supra.)

For all the foregoing reasons, we submit that the pleas state facts showing a violation of the statute in that no investigation of this case was begun in the November Term.

We pass now to the point that the grand jury had no jurisdiction because this case was not within the scope of the court's order authorizing its continued existence. The order is quoted supra, page 7.

As already noted, the Government filed a petition on February 26th (R. 22-23), alleging that "certain investigations **have been begun,**" and asking the court's order "authorizing" the grand jury to sit at the March Term "solely to finish **said** investigations begun but not finished."

It is apparently the Government's present position that the investigation was started on February 27th, in which event it could not have been included in the petition of February 26th, or in the court's order made upon that petition (R. 4, 48; quoted supra). However, the Government now claims that the court's order should be construed to include any investigation begun in the November Term, whether before or after the date of the petition or order.

We submit that there is no basis for such an argument. The order in express terms authorized the grand jury to continue solely for the purpose of finishing the investigations referred to in the Government's petition. If the trial court had been told that the Government wanted an order continuing this particular grand jury for the investigation of any number of "industries" who might be "named" to the grand jury at the last minute, the order, we submit, should and would not have been granted. Such an order would rest on a "construction" depriving the statute of all substantial meaning.

We submit that the pleas state facts sufficient to show that there was a violation both of the statute and of the court's order authorizing the continued functioning of the grand jury.

B. The Government's contention that the indictment is valid even if the investigation was not begun in the November 1940 Term is (1) contrary to the statute, and (2) not open to the Government in this Court, because it is first advanced in this Court after certiorari granted and is contrary to the Government's express admissions in both courts below.

The Government's next point against the sufficiency of the pleas is that the statute (Judicial Code, sec. 284; 28 U.S.C. 421, quoted supra) has no effect on the validity of an indictment; a grand jury may be held over and a valid indictment can be returned in a matter of which the investigation was not begun at the prior term.

The Government does not deny that the conduct of the prosecuting officials and of the grand jury in seeking and returning such an indictment is a violation of the statute, or that the point of violation was seasonably raised by respondents. It contends, however, that the statute is only "directory," which means in plain words that the prosecution may with impunity disregard it.

It is settled that the existence of a grand jury depends on the constitution and statutes; unless it has constitutional or statutory authority to act, an indictment returned by it is void (*Ex parte Farley* (C.C. Ark., 1889) 40 Fed. 66, 69; approved by this Court in *In re Mills* (1890) 135 U.S. 263, 267; *United States v. Johnson* (7th C.C.A., 1941) 123 F. (2d) 111, 118, 120, supra p. 30; *Renigar v. United States* (1909) 172 Fed. 646, 658; also cases supra, pp. 30-34).

The Government cites no case for its point, and we know of no case which holds that the statute and not the indictment is to be held ineffective when the grand jury violates an express statutory provision fixing its life or limiting the class of cases it can consider.

And see *United States v. McKay* (D.C. Mich., 1942) 45 F. Supp. 1007, 1013-1015, another authority directly in point

As noted before (supra, p. 63), the statute speaks in jurisdictional terms; it says that the court may "authorize" the grand jury to continue to sit, but not for more than eighteen months, and "solely" to conclude investigations begun but not finished. These provisions are in the same sentence; if the time limitation is jurisdictional, as is obvious, the limitation of subject matter is also jurisdictional.

The provisions of the statute which were violated in this case are not mere formal requirements. One of their obvious purposes is to prevent the prosecution from retaining, at will, a supposedly favorable grand jury (supra, p. 49).

The first answer therefore to the Government's present contention is that it is unsupported, unsound, and contrary to the language of the statute. A second answer is that the contention is not available to the Government in this Court, because it is contrary to the Government's contentions and express admissions in both courts below.

From start to finish, in the District Court and in the Circuit Court of Appeals, the Government assumed, implied, stated and contended that the indictment was void if the investigation was not begun at the November 1940 Term.

The majority opinion of the Circuit Court of Appeals states (R. 133):

> "It is conceded that if these facts are true the grand jury had no power to consider the matter or to return the indictment."

In argument in the Circuit Court of Appeals government counsel said (Transcript of Argument, p. 34):

"Finally, the petitioners contend that if the facts they purport to allege in their plea in abatement are true, that the indictment is void and the court below is without jurisdiction. The argument is thoroughly sound.

* * * * * * *

There is no question, your Honor, but what the authority of the grand jury to return a valid indictment depends upon that statute, and if they exceeded the terms of the statute, they had no authority to return the indictment. Therefore, the indictment must be void. And if the indictment is void, the court would be without jurisdiction to try the defendants on the charges contained in the indictment. I agree with that."

The Government's return to the order to show cause states that respondents' pleas

"were in effect pleas to the jurisdiction of the said November 1940 term grand jury and of the respondent court" (R. 59).

In the trial court government counsel admitted respondents' right to a jury trial on the issue raised by the pleas as to when the investigation was begun (R. 8-9), an admission not to be reconciled with the claim that that issue was legally irrelevant:

"The Court. Are you entitled to a jury as a matter of right?

Mr. Dunne. Yes.

The Court. Are you satisfied he is?

Mr. Burdell. Yes. I don't know what I can do about it if he insists on a jury."

Subsequently the Government changed its position and asked leave to withdraw its traverse of the pleas and to

move to strike them, all as already related (supra, p. 15). Still, however, there was no suggestion that it was immaterial whether the investigation was begun in the November Term or not. There was no suggestion that it was immaterial whether the prosecution and grand jury acted upon new matters in violation of that statute, or in violation of the court's order under the statute, both of which limited the authority of the grand jury to matters begun but not finished in the November Term. There was no such hint or suggestion in the Circuit Court of Appeals, where government counsel argued to the exact contrary of their present contention, nor was there any such hint or suggestion in the petition for certiorari or assignment of errors therein (Petition, p. 5).

Under these conditions, we submit that the case is governed by the rule many times stated by this Court that, after a case has been tried on one theory by both parties, a new and different theory will not be considered when advanced in this Court.

In *Helvering v. Wood* (1940) 309 U.S. 344, 348, this Court held:

> "Though petitioner in his petition for certiorari relied on § 22 (a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. • • • To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation."

In *Helvering v. Tex-Penn Co.* (1937) 300 U.S. 481, the court said (p. 498):

> "The parties presented their respective claims to the board and to the lower court on the theory that, if neither Tex-Penn nor its stockholders as such received any cash from Transcontinental, the transaction would be within § 202 (b). The commissioner's notices of deficiency do not suggest the construction for which he now contends. He sought no ruling upon the question from the board or the lower court and is therefore not entitled to have it decided here. *Helvering v. Minnesota Tea Co.*, 296 U.S. 378, 380. The taxpayers were entitled to know the basis of law and fact on which the commissioner sought to sustain the deficiencies."

In *New York Elevated Railroad v. Fifth National Bank* (1890) 135 U.S. 432, the Court said (p. 441):

> "But we are relieved from the necessity of laying down a general rule on the subject, because in this case it clearly appears that the defendant procured or acquiesced in the rulings under which the trial was conducted, and thereby waived the right to object to them."[19]

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[19] See also:
Hormel v. Helvering (1941) 312 U.S. 552, 556;
Helvering v. Minnesota Tea Co. (1935) 296 U.S. 378, 380;
Minnich v. Gardner (1934) 292 U.S. 48, 53;
Burnet v. Commonwealth Imp. Co. (1932) 287 U.S. 415, 418;
Adams v. Mills (1932) 286 U.S. 397, 416-417;
United Railways v. West (1930) 280 U.S. 234, 248-249;
Lutcher & Moore Lumber Co. v. Knight (1910) 217 U.S. 257, 267;
Texas & Pac. Ry. v. Abilene Cotton Oil Co. (1907) 204 U.S. 426, 435;
Minneapolis & St. Louis R.R. Co. v. Winters (1917) 242 U.S. 353;
San Juan Light Co. v. Requena (1912) 224 U.S. 89, 97;
Robinson & Co. v. Belt (1902) 187 U.S. 41, 50;
New York &c. Railroad Co. v. Estill (1893) 147 U.S. 591.

CONCLUSION.

We respectfully submit that the judgment of the Circuit Court of Appeals should be affirmed.

Dated, San Francisco, California,
March 26, 1943.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 584.—October Term, 1942.

Honorable Michael J. Roche, United States District Judge for the Northern District of California, Southern Division, et al., Petitioners, *vs.* Evaporated Milk Association, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[May 3, 1943.]

Mr. Chief Justice Stone delivered the opinion of the Court.

The question for decision is whether the Circuit Court of Appeals below rightly issued its writ of mandamus to the district court to correct that court's alleged error in striking respondents' pleas in abatement to a criminal indictment.

An indictment returned in June, 1941, by the grand jury sitting in the district court for Southern California, charged respondents and others with conspiracy to fix the price of evaporated milk sold in interstate commerce in violation of §§ 1 and 3 of the Sherman Act, 15 U. S. C. §§ 1, 3. The indictment recited that the grand jury which returned it had been impaneled at the November, 1940, term of court; that it had "begun but not finished during said November 1940 Term of said Court, an investigation of the matters charged in this indictment"; and that by order of the court the grand jury had continued to sit during the March, 1941, term "for the sole purpose of finishing investigations begun but not completed during said November Term."

In September, 1941, respondents filed pleas in abatement, asking that the indictment be quashed for want of jurisdiction of the court, on averments that the minutes of the grand jury for its meeting of February 28, 1941, disclosed that no investigation of any matter mentioned in the indictment had been "begun" by the grand jury within the meaning of § 284 of the Judicial

Code, 28 U. S. C. § 421,[1] during the November, 1940, term of court, which expired March 2, 1941.[2]

The Government filed replications denying generally all the allegations of the pleas, and the issues thus raised were set for trial before a jury. Thereafter leave was granted to the Government to withdraw its replications and to file demurrers to the pleas, and motions to strike them because insufficient in law, because they failed to state specific facts with sufficient certainty, and because they alleged facts which could not be within the pleaders' knowledge. After argument the district court sustained the demurrers and granted the motions. Respondents thereupon instituted the present proceeding by their petition to the Circuit Court of Appeals for the Ninth Circuit, praying that a writ of mandamus issue directing petitioners—the Honorable Michael J. Roche, district judge, and the district court—to reinstate the pleas in abatement and the Government's replications, and to set the issues raised by the pleas and replications for jury trial.

On the petition for the writ and the Government's return, the court of appeals ordered the writ to issue. Upon rehearing before the full court sitting *en banc* the court held that it had jurisdiction to issue the writ; that the district court had erred in striking the pleas in abatement; that the case was an appropriate one for intervention by mandamus; and that the writ should issue directing petitioners to reinstate the pleas in abatement and the replications, and to try the issues of fact thus raised. 130 F. 2d

[1] That section provides in part:

"A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months . . ."

[2] The grand jury minutes for February 28, 1941, stated:

"Special meeting of the Federal Grand Jury held this day, Foreman Mrs. Hattie H. Slossy presiding. Minutes of previous meeting read and approved as corrected. See below. Special Assistant to the Attorney General Charles S. Pearce and Special Assistant Charles S. Burdell continued the presentation of the peach industry for violation of the Sherman Anti-Trust Act. There being no further business the meeting adjourned."

Then below the following appears:

"The following industries were also named by witnesses and investigation begun. Plywood; Wines and Grape Industry; Wholesale and Retail Groceries; Canned and Evaporated Milk; Canned Fruit and Vegetables; Sardine Industry; all Food Industries were suggested for investigation, and investigation of Sugar Beet Industry was begun. Other industries named as subject for investigation are Salmon Industry, Canned Pineapple, Walnuts and Almonds, Tomatoes, Dried fruits, and a certain Labor Union with headquarters or located in Oakland. Asparagus and Cherries."

843. The court of appeals seems to have regarded the district court's order striking the pleas in abatement as in effect a refusal to act upon the pleas. *Id.* 845. We granted certiorari, 318 U. S. , on a petition which set up that the circuit court of appeals erred in directing that mandamus issue, and in holding that the district court erred in striking the pleas in abatement.

Petitioners concede that the circuit court of appeals, like this Court, may, as provided by § 262 of the Judicial Code, 28 U. S. C. § 377, "issue all writs not specifically provided for by statute which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law". *McClellan* v. *Carland*, 217 U. S. 268, 279; *Adams* v. *United States ex rel. McCann*, 317 U. S. 269, 272-3. They argue that as the district court's order striking the pleas in abatement was an exercise of its jurisdiction, its action is reviewable only on appeal and not by mandamus, and that since by Congressional enactment and policy appellate review of the district court's order may be had only on review of a final judgment of conviction, that legislation and policy are not to be circumvented by resort to mandamus.

We are of opinion that in the circumstances of this case these are valid objections to the exercise by the circuit court of appeals of its discretionary power to issue the writ.

As the jurisdiction of the circuit court of appeals is exclusively appellate, its authority to issue writs of mandamus is restricted by statute to those cases in which the writ is in aid of that jurisdiction. Its authority is not confined to the issuance of writs in aid of a jurisdiction already acquired by appeal but extends to those cases which are within its appellate jurisdiction although no appeal has been perfected. Otherwise the appellate jurisdiction could be defeated and the purpose of the statute authorizing the writ thwarted by unauthorized action of the district court obstructing the appeal. *Ex parte Bradstreet*, 7 Pet. 634; *Insurance Company* v. *Comstock*, 16 Wall. 258, 270; *McClellan* v. *Carland*, *supra*, 280; *Ex parte United States*, 287 U. S. 241, 246; cf. *Ex parte Siebold*, 100 U. S. 371, 374-5; *Ex parte Republic of Peru*, No. 13 Orig., April 5, 1943, and cases cited.

The common law writs, like equitable remedies, may be granted or withheld in the sound discretion of the court. *Ex parte Republic of Peru*, *supra*, p. 4, and cases cited; *Whitney* v. *Dick*, 202 U. S. 132, 136, 140. Hence the question presented on this record is not whether the court below had power to grant the writ but

whether in the light of all the circumstances the case was an appropriate one for the exercise of that power. In determining what is appropriate we look to those principles which should guide judicial discretion in the use of an extraordinary remedy rather than to formal rules rigorously controlling judicial action. Considerations of importance to our answer here are that the trial court, in striking the pleas in abatement, acted within its jurisdiction as a district court; that no action or omission on its part has thwarted or tends to thwart appellate review of the ruling; and that while a function of mandamus in aid of appellate jurisdiction is to remove obstacles to appeal, it may not appropriately be used merely as a substitute for the appeal procedure prescribed by the statute.

The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so. *Ex parte Peru*, *supra*, p. 4, and cases cited; *Ex parte Newman*, 14 Wall. 152, 163, 169; *Ex parte Sawyer*, 21 Wall. 235, 238; *Interstate Commerce Commission* v. *United States ex rel. Campbell*, 289 U. S. 385, 394. Even in such cases appellate courts are reluctant to interfere with the decision of a lower court on jurisdictional questions which it was competent to decide and which are reviewable in the regular course of appeal. *Ex parte Harding*, 219 U. S. 363, 369; cf. *Stoll* v. *Gottlieb*, 305 U. S. 165; *Trienies* v. *Sugarloaf Mining Co.*, 308 U. S. 66.

But the present case involves no question of the jurisdiction of the district court. Its jurisdiction of the persons of the defendants and of the subject matter charged by the indictments is not questioned. This is not a case like *Ex parte Bain*, 121 U. S. 1, where the petitioner had been convicted on an indictment which, because it had been amended after it was returned by the grand jury, was thought to be "no indictment of a grand jury." Here the indictment was returned by the requisite number of duly qualified grand jurors, acting under order of the court continuing the grand jury in session. The objection that the subject matter of the indictment was not one which the jury had been or could be continued to hear was at most an irregularity which, if the proper subject of a plea in abatement, did not affect the jurisdiction of the court. Cf. *Ryan* v. *United States*, 226 U. S. 1, 10-11; *Kaizo* v. *Henry*, 211 U. S. 146, 149; *Matter of Moran*, 203 U. S. 96, 104; *Harlan* v. *McGourin*, 218 U. S. 442, 451; *In re Ward*, 173 U. S. 452, 454.

Nor does this case involve a refusal by the district court to adjudicate issues properly presented to it, such as justified the issuance of the writ in *McClellan* v. *Carland*, *supra*. Compare *Ex parte United States*, *supra*. In sustaining the Government's demurrers to the pleas and its motions to strike, the district court did not, as the court below seemed to think, refuse to act on the pleas. Instead, it held that they were insufficient in law to abate the criminal prosecution. In thus ruling on questions of law decisive of the issue presented by the pleas and replications the district court acted within its jurisdiction as a federal court to decide issues properly brought before it. Its decision, even if erroneous—a question on which we do not pass—involved no abuse of judicial power, and any error which it may have committed is reviewable by the circuit court of appeals upon appeal appropriately taken from a final judgment, and by this Court by writ of certiorari.[3]

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[3] In the court below petitioners urged that the decision of the district court in striking the pleas in abatement could not have been reviewed by the circuit court of appeals after final judgment by reason of R. S. § 1011, which has been carried over in substance into 28 U. S. C. § 879. R. S. § 1011 provides:

> "There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

This provision was taken from § 22 of the Judiciary Act of 1789, 1 Stat. 79, 84, a section which was in terms applicable only to civil cases. Neither the Judiciary Act of 1789 nor the Revised Statutes made any provision for review of federal criminal cases on writ of error, although R. S. §§ 651 and 697 provided for certification to the Supreme Court of questions arising in criminal cases. Review on writ of error of criminal cases in the federal courts was first established by the Act of Mar. 3, 1879, 20 Stat. 354, authorizing review of district court decisions by circuit courts. By § 6 of the Act of February 6, 1889, 25 Stat. 655, 656, the Supreme Court was given appellate review of capital cases on writ of error, and §§ 5 and 6 of the Judiciary Act of 1891, 26 Stat. 826, 827-8, abolished the appellate powers of the circuit courts, enlarged the appellate criminal jurisdiction of the Supreme Court, and authorized review of criminal cases tried in the circuit and district courts, by the circuit courts of appeals on writ of error.

None of these acts contains any provision making applicable to criminal cases reviewed on writ of error the limitations which § 22 of the Judiciary Act of 1789 imposed on such review of civil cases. Although R. S. § 1011 is phrased in terms of general applicability, it was held in Buck Stove Co. v. Vickers, 226 U. S. 205, 213, that the rearrangement and rewording in the Revised Statutes of § 22 of the Judiciary Act of 1789 was not intended to change the meaning of that section, and that since § 22 had applied only to cases from federal courts, R. S. 1011 did not prevent consideration of a ruling on a plea in abatement in a case on writ of error from a state court. We think that similar reasoning applies here to preclude the section's application to criminal cases, to which in its original form it did not apply.

In a large number of criminal cases this Court and the circuit courts of appeals have reviewed on the merits decisions overruling or refusing to entertain pleas in abatement, although without reference to R. S. § 1011. Agnew v.

Ordinarily mandamus may not be resorted to as a mode of review where a statutory method of appeal has been prescribed or to review an appealable decision of record. *Ex parte Morgan*, 114 U. S. 174, 175; *In re Atlantic City R. R. Co.*, 164 U. S. 633, 635; *Ex parte Roe*, 234 U. S. 70, 73; *Ex parte Park Square Automobile Station*, 244 U. S. 412, 414; *Ex parte Riddle*, 255 U. S. 450, 451. Circuit courts of appeals, with exceptions not now material, have jurisdiction to review only final decisions of district courts, 28 U. S. C. §§ 225(a).[4] Respondents stress the inconvenience of requiring them to undergo a trial in advance of an appellate determination of the challenge now made to the validity of the indictment. We may assume, as they allege, that that trial may be of several months' duration and may be correspondingly costly and inconvenient. But that inconvenience is one which we must take it Congress contemplated in providing that only final judgments should be reviewable. Where the appeal statutes establish the conditions of appellate review an appellate court cannot

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United States, 165 U. S. 36, 43-5; Bram *v.* United States, 168 U. S. 532, 566-8; Crowley *v.* United States, 194 U. S. 461, 468-74; Holt *v.* United States, 219 U. S. 245, 247-8; Hyde *v.* United States, 225 U. S. 347, 372-4; e. g. Dunn *v.* United States, 238 Fed. 508; Breese *v.* United States, 143 Fed. 250, 252-3; Mullaney *v.* United States, 79 F. 2d 566, 572-80; Hillman *v.* United States, 192 Fed. 264, 269-70; Lowden *v.* United States, 149 Fed. 673. A few circuit courts of appeals have said that the section prevented appellate consideration of a decision overruling a plea in abatement to an indictment, although also holding that the pleas were properly overruled. Mounday *v.* United States, 225 Fed. 965, 967 (C. C. A. 8); Luxenberg *v.* United States, 45 F. 2d 497, 498 (C. C. A. 4); Biemer *v.* United States, 54 F. 2d 1045 (C. C. A. 7); United States *v.* Molasky, 118 F. 2d 128, 133 (C. C. A. 7). And the section has on occasion been cited as precluding appellate review of the weight and sufficiency of the evidence in criminal cases—a proposition which hardly needs its support. Miles *v.* United States, 103 U. S. 304, 313; e. g. Jaramillo *v.* United States, 76 F. 2d 700; Rosenberg *v.* United States, 15 F. 2d 179, 181; Jezewski *v.* United States, 43 F. 2d 599, 602; Stocco *v.* United States, 1 F. 2d 612, 613; Kinser *v.* United States, 231 Fed. 856, 861. The fact that the great majority of appellate decisions, including all in this Court, have considered pleas in abatement on the merits, establishes a practice, beginning soon after the first authorization of criminal appellate review, which is persuasive of the statutory intent.

Our conclusion that R. S. § 1011 is inapplicable to criminal cases is reinforced by a consideration of the kinds of objections which in a criminal case may properly be the subjects of a plea in abatement. Although frequently described as a dilatory plea which should be strictly construed, United States *v.* Green, 113 Fed. 683, 688-9, such a plea is an appropriate means of raising objections to an indictment which may involve serious and prejudicial infringements of procedural rights, such as an objection to the qualifications of grand jurors, Crowley *v.* United States, *supra* (compare the Act of April 30, 1934, 48 Stat. 648, 649, 18 U. S. C. 554a); to the method of selection of the grand jury, Agnew *v.* United States, *supra* (cf. Glasser *v.* United States, 315 U. S. 60, 85); or to its composition, see Carter *v.* Texas, 177 U. S. 442, 447.

[4] By the Act of May 9, 1942, Pub. L. No. 543, 77th Cong., 2d Sess., the Government is given a right of appeal from a decision or judgment sustaining a plea in abatement to an indictment or information or any count thereof.

rightly exercise its discretion to issue a writ whose only effect would be to avoid those conditions and thwart the Congressional policy against piecemeal appeals in criminal cases. *Cobbledick v. United States*, 309 U. S. 323. As was pointed out by Chief Justice Marshall, to grant the writ in such a case would be a "plain evasion" of the Congressional enactment that only final judgments be brought up for appellate review. "The effect therefore of this mode of interposition would be to retard decisions upon questions which were not final in the court below, so that the same cause might come before this Court many times before there could be a final judgment." *Bank of Columbia v. Sweeny*, 1 Pet. 567, 569. See also *Life & Fire Insurance Co. v. Adams*, 9 Pet. 573, 602; *Ex parte Hoard*, 105 U. S. 578, 579-80; *American Construction Co. v. Jacksonville Ry.*, 148 U. S. 372, 379.

For that reason this Court has consistently refused to sustain the use of mandamus as a means of reviewing the action of a district court in denying a motion to remand a cause to the state court from which it had been removed. *Ex parte Hoard, supra; Ex parte Harding, supra; Ex parte Roe, supra; Ex parte Park Square Automobile Station, supra.*[6] And for the same reason it has held in other cases that the writ will not issue to review an order overruling a plea to the jurisdiction, *In re Atlantic City R. R. Co., supra; Ex parte Chicago, P. I. & P. Ry. Co.*, 255 U. S. 273, 280; cf. *In re New York & Porto Rico S. S. Co.*, 155 U. S. 523, 531, or denying a nonsuit, *Ex parte Lorillig*, 94 U. S. 418, despite the inconvenience to petitioner of being forced to proceed to trial in advance of a review of the court's action. *Ex parte Whitney*, 13 Pet. 404, 408; *Ex parte Perry*, 102 U. S. 183, 186. Here the inconvenience to the litigants results alone from the circumstance that Congress has provided for review of the district court's order only on review of the final judgment, and not from an abuse of judicial power, or refusal to exercise it, which it is the function of mandamus to correct. Hence there are in this case

[6] Mandamus has frequently been used to compel the remand to a state court of a criminal case improperly removed under § 31 33, of the Judicial Code, 28 U. S. C. § 74(6). Maryland v. Soper (No. 1), 270 U. S. 9, and cases cited; Colorado v. Symes, 286 U. S. 510. But removal of such cases involves an extraordinary interference with a state's administration of criminal justice such as to justify an exceptional use of the writ. Moreover, in those cases there was no provision for appeal by the state from an acquittal, Maryland v. Soper, *supra*, 30; cf. United States v. Langes, 154 U. S. 319. And see Kepner v. United States, 195 U. S. 100 with which compare Palko v. Connecticut, 302 U. S. 319, 322 3.

no special circumstances which would justify the issuance of the writ: such as the persistent disregard of the Rules of Civil Procedure prescribed by this court, found in *McCullough* v. *Cosgrove*, 309 U. S. 634 (see *Los Angeles Brush Co.* v. *James*, 272 U. S. 701, 706-8); or the refusal to perform a plain ministerial duty, involved in *Ex parte United States*, *supra*; or the considerations of comity between state and federal courts, thought to be controlling in *Maryland* v. *Soper*, (No. 1), 270 U. S. 9, 29.

The decisions of this Court on which respondents especially rely are not applicable here. In *Ex parte Simons*, 247 U. S. 231, the writ directed the district court to set aside its order transferring to the equity docket a case plainly triable at law by jury. The district court's order was regarded by this Court, "as having repudiated jurisdiction" of the suit. In *Ex parte Peterson*, 253 U. S. 300, in which the writ was sought similarly to compel the district court to set aside its order referring the cause to an auditor, the application was denied because the order was held not to preclude a jury trial. And in *Ex parte Skinner & Eddy*, 265 U. S. 86, the writ prohibited the Court of Claims from exercising jurisdiction, contrary to statute, over a suit which it had previously dismissed. There its assumption of jurisdiction would have deprived the litigants of trial by jury in a state court where an action against an agency of the United States involving the same issue was pending. Thus in the two cases in which the writ was granted, it was issued in aid of the appellate jurisdiction of this Court to compel an inferior court to relinquish a jurisdiction which it could not lawfully exercise or to exercise a jurisdiction which it had unlawfully repudiated. Cf. *Ex parte Republic of Peru*, *supra*. In the present case the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of judicial power. In issuing the writ the court of appeals below has done no more than substitute mandamus for an appeal contrary to the statutes and the policy of Congress, which has restricted that court's appellate review to final judgments of the district court.

Reversed.

Mr. Justice MURPHY took no part in the consideration or decision of this case.